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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 172

THE UNITED STATES, PETITIONER

vs.

THE SEMINOLE NATION

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JULY 8, 1936
CERTIORARI GRANTED OCTOBER 12, 1936

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

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THE UNITED STATES, PETITIONER

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THE SEMINOLE NATION

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 In United States Court of Claims

No. L–51

THE SEMINOLE NATION, PLAINTIFF

vs.

THE UNITED STATES, DEFENDANT

Petition

Filed February 24, 1930

To the honorable the Court of Claims:

The petitioner, the Seminole Nation, respectfully represents:

I

That by a certain Act of Congress, approved May 20th, 1924 (Pub. 124, 65 Congress, as modified by Joint Resolution, 44 Stat. 568, giving permission to file separate petitions), petitioner was authorized and empowered to bring this action.

II

2 That at all times mentioned herein, and for many years prior thereto, the Seminole Nation was the owner of large trust funds, held in trust by the defendant for its use and benefit, and that there existed various treaties and agreements between said plaintiff and defendant whereby said trust funds were to be managed and invested by defendant, and the interest thereon paid over to the National Treasurer of plaintiff.

III

That from and after the passage of a certain Act of Congress, approved June 28th, 1898 (30 Stat. 495), defendant impounded all of the funds of plaintiff, refused to further pay them over to plaintiff's National Treasurer, and proceeded to disburse them for various purposes as shall hereinafter appear.

IV

That the only authority given by said Act for the disbursement of plaintiff's funds is Section 19 thereof, which said section is as follows, to-wit:

"Sec. 19. That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but

payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

3 V

That after the passage of said last named Act, Congress passed various acts giving authority for the expenditure of plaintiff's funds, but plaintiff avers that no subsequent act gave authority for the expenditure of the funds hereinafter mentioned.

VI

That from July 1st, 1898, until the present time, defendant, in violation of its duty as trustee of the funds of plaintiff, in violation of the rights of plaintiff under its various treaties and agreements with defendant, and without authority of Congress, has spent large sums of the trust funds of plaintiff.

VII

That at all times mentioned herein a certain Act of Congress, now known as Sec. 2097, Revised Statutes of the United States, was in full force and effect. That said section is as follows, to-wit:

"No funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner not authorized by such treaty, or by express provisions of law; nor shall money appropriated to execute a treaty be transferred or applied to any other purpose, unless expressly authorized by law."

4 VIII

That the defendant has thus spent, in violation of law, a large amount of the trust funds of plaintiff. That the exact amount of such expenditure will be shown by the books and records of defendant, and that such knowledge is in the possession of defendant, and not of plaintiff.

Wherefore, plaintiff prays that defendant be required to file in this cause a statement showing its expenditures of plaintiff's funds during said period, the purposes for and dates when such expenditures were made, and the authority of law, if any, which authorized defendant to make such expenditures; that, if necessary thereafter, plaintiff be permitted to amend this petition, and that plaintiff have judgment against the defendant in such sum or sums as appear to this court to be expended without authority of law, with interest

at six per centum per annum from the date of the expenditure of the several items constituting said sum.

THE SEMINOLE NATION,
By E. J. VAN COURT,
Its Attorney of Record.

Counsel:
J. B. CAMPBELL,
PAUL M. NIEBELL,
E. L. EWING.

5 [*Duly sworn to by E. J. Van Court, jurat omitted in printing.*]

6 II. *General traverse*

Filed April 5, 1930

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

CHARLES B. RUGG,
Assistant Attorney General.

7 III. *History of proceedings*

On September 4, 1934, the plaintiff filed a motion for leave to file an amended petition.

On September 19, 1934, the court allowed said motion, and the amended petition was filed on the same day, which is as follows:

IV. *Amended petition*

Filed September 19, 1934

To the honorable the Court of Claims:

The plaintiff, the Seminole Nation, respectfully represents:

I

That by a certain act of Congress, approved May 20th, 1924 (43 Stat. 133, as modified by Joint Resolution approved May 19, 1926, 44 Stat. 568, giving permission to file separate petitions, and Joint Resolution of February 19, 1929, 45 Stat. 1229, extending the
8 time for filing suits until June 30, 1930), plaintiff was authorized and empowered to bring this action.

II

That at all times mentioned herein, and for many years prior thereto, the Seminole Nation was the owner of large trust funds, which represented the consideration given by the United States for

the cession of certain of its lands, which said trust funds were held in trust by the defendant for the use and benefit of plaintiff; and that there existed various treaties and agreements between said plaintiff and defendant and certain acts of Congress whereby said trust funds were to be managed and invested by defendant for the benefit of plaintiff, which said treaties, agreements, and statutes are hereinafter more specifically referred to.

III

That the Seminole Treaty of August 7th, 1856 (11 Stat. 699), provided in part as follows:

"Article 8. In consideration of such release, discharge, and obligation, * * * the United States do therefore agree and stipulate as follows, viz: To pay to the Seminoles now in the west, * * * to provide annually for ten years the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith-shops among them, said sums to be ap-
9 plied to these objects in such manner as the President shall direct."

"Article 9. The United States agree to * * * expend for them in improvements, after they shall all remove, the sum of twenty thousand dollars."

That under said Articles 8 and 9, the total obligation of the United States to the Seminole Nation was $92,000.00. That notwithstanding said definite treaty obligation the defendant, in violation thereof, failed and neglected to disburse all of said $92,000.00 for the benefit of plaintiff in accordance with the terms of said treaty, and therefore the defendant is now liable to plaintiff for the balance due thereunder in the amount of, to-wit, $63,353.42.

IV

That Article 8 of said Treaty of August 7th, 1856, 11 Stat. 699, provided further in part as follows:

"* * * the United States do therefore agree and stipulate as follows, viz: * * * Also to invest for them the sum of two hundred and fifty thousand dollars, at five per cent per annum, the interest to be regularly paid over to them per capita as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the two sums so invested shall constitute a
10 fund belonging to the united tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them per capita as an annuity; but no portion of the principal thus invested, or the interest thereon annually due and payable,

shall ever be taken to pay claims or demands against said Indians, except such as may hereafter arise under the intercourse laws."

That notwithstanding the plain obligation of the United States to pay interest on said funds at the rate of five per centum per annum under the terms of said treaty, the defendant, in violation thereof, failed and neglected to pay said interest in accordance with the terms of said treaty, and therefore the defendant is now liable to plaintiff for the amount of said unpaid interest, amounting to $304,551.28.

V

That Article 3 of the Seminole Treaty of March 21st, 1866, 14 Stat. 755, provides in part as follows:

"* * * The balance due the Seminole Nation after making said deduction, amounting to one hundred thousand dollars, the United States agree to pay in the following manner, to-wit: * * * seventy thousand dollars to remain in the United States Treasury, upon which the United States shall pay an annual interest of five per cent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be
11 paid annually and appropriated to the support of schools: * * *"

That although said treaty provision continued in full force and effect until the close of the fiscal year 1909 (see the Act of March 3, 1909, 35 Stat. 781, capitalizing said $50,000.00 fund), yet the defendant in violation of its said obligation, failed and neglected to pay the interest of $2,500.00 annually for the support of schools in accordance with the terms of said treaty, and therefore the defendant is now liable to plaintiff for the balance due thereunder in the amount of, to-wit, $90,597.20.

VI

That said Article 3 of said Treaty of March 21, 1866, 14 Stat. 755, further provided in part as follows:

"Fifteen thousand dollars shall be paid for the erection of a mill suitable to accommodate said nation of Indians:"

That notwithstanding said plain obligation the defendant failed and neglected to erect the said mill in accordance with its obligation under said Article 3, and therefore the defendant is now liable to the plaintiff in the amount of $15,000.00.

VII

That Article 6 of the Treaty of March 21, 1866, 14 Stat. 755, provided as follows:

12 "Inasmuch as there are no agency buildings upon the new Seminole reservation, it is therefore further agreed that the United States shall cause to be constructed, at an expense not ex-

ceeding ten thousand ($10,000) dollars, suitable agency buildings, the site whereof shall be selected by the agent of said tribe, under the direction of the superintendent of Indian Affairs, in consideration whereof, the Seminole Nation hereby relinquish and cede forever to the United States one section of their lands upon which said agency buildings shall be directed (erected), which land shall revert to said nation when no longer used by the United States, upon said nation paying a fair value for said buildings at the time vacated."

That although said amount of $10,000 was twice appropriated by Congress for the fulfillment of said Article 6, yet the defendant failed and neglected to erect said agency buildings in accordance with the terms of said treaty, and, therefore, the defendant is now liable to plaintiff for the said amount of $10,000.00 under said treaty obligation.

VIII

That from and after the passage of a certain act of Congress, approved June 28th, 1898, 30 Stat. 495, defendant impounded all the funds of plaintiff, and assumed full administrative control over the disbursement of same.

13 That Section 19 of said Act of June 28th, 1898, provided as follows:

"Sec. 19. That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

That notwithstanding the plain inhibition in said Section 19 that no payments thereafter should be made to "the tribal governments or to any officer thereof for disbursement", yet in violation of said section the defendant illegally disbursed the amounts hereinafter set forth, derived from the following sources:

Treaty of August 7, 1856, Funds	$212,500.00
Treaty of March 21, 1866, Funds	29,750.00
Act of March 2nd, 1899, Funds	622,156.87
Indian Moneys, Proceeds of Labor Fund	295.71
Total	864,702.58

Therefore, the defendant is liable to the plaintiff in the amount of $864,702.58 for the violation of said Section 19 of said Act of June 28th, 1898.

14 IX

That the Original Seminole Agreement, dated December 16, 1897, and ratified by Act of July 1, 1898, 30 Stat. 567, provided in part as follows:

"Five hundred thousand dollars ($500,000) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five per cent interest, or invested so as to produce such amount of interest, which shall be, after extinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of the Seminole people; and there shall be selected and excepted from allotment three hundred and twenty acres of land for each of said academies and eighty acres each for eight district schools in the Seminole country."

That said "Seminole School Fund" was established on March 6, 1906 (G. A. O. Report, pp. 275; 344). That notwithstanding the plain provisions of the above-quoted Seminole Agreement that said school fund was to be a permanent fund for the education of the children of the members of said tribe, the defendant in violation thereof, and without authority of law, disbursed from the principal thereof the amount of $154,455.30. Therefore, the amount of $154,-455.30 is due the Seminole Nation from the defendant for the said violation of the above-quoted provisions of said Seminole Agreement.

X

That Section 18 of the Act of August 24, 1912, 37 Stat. 518, provides in part as follows:

"Provided, That during the fiscal year ending June thirtieth, nineteen hundred and thirteen, no moneys shall be expended from the tribal funds belonging to the Five Civilized Tribes without specific appropriation by Congress * * *"

That similar provisions to the one above quoted were carried in all subsequent Indian Appropriation Acts, and said provision was made a permanent provision of law by the Act of May 24, 1922, 42 Stat. 575. That under the provisions of said above-quoted law no tribal money of the Seminole Nation could be disbursed without a specific appropriation by Congress. That notwithstanding this plain provision of law, the defendant, in violation thereof, from the fiscal year 1913 to date, disbursed the amounts hereinafter set forth for the following purposes without specific appropriation by Congress:

Cash Payments in Lieu of Allotments	Fis. Yr.	1918	$120.00
Expenses of Making Per Capita Payments	" "	1914–1920	4,981.25
Education	" "	1913–1930	55,370.04
Insurance	" "	1915–1925	1,386.20
Construction and Repair of Buildings	" "	1913–1916	4,389.88
Total			$66,247.37

Therefore, the defendant is liable to the plaintiff in the total amount of $66,247.37 for the violation of the above-quoted provision of law.

XI

Plaintiff further shows unto the court that the audit of the books of defendant, as contained in the report of the General Accounting Office filed herein, admits errors of bookkeeping in defendant's handling of the trust funds of plaintiff, resulting in a net loss to plaintiff of a total sum of, to-wit, $178,533.42, the details of which will be set forth hereafter in plaintiff's request for findings of fact.

XII

Wherefore, plaintiff prays that judgment be entered against defendant for the total amounts of said illegal disbursements and said erroneous bookkeeping entries, together with interest on same at five per cent on all illegal disbursements and erroneous bookkeeping entries from Seminole Trust Funds, which by law draw said rate
17 of interest, and interest at the rate of four per cent on all other of said illegal disbursements and erroneous bookkeeping entries in accordance with the provisions of the Act of February 12, 1929, 45 Stat. 1164.

THE SEMINOLE NATION,
By E. J. VAN COURT,
Its Attorney of Record.

Of Counsel:
J. B. CAMPBELL,
W. W. PRYOR,
P. M. NIEBELL.

[*Duly sworn to by E. J. Van Court, jurat omitted in printing.*]

18 V. *Notation of no answer having been filed*

No demurrer, plea, answer, or other defense in the premises, having been filed by the defendant, a notation to that effect was entered on the docket in the case, as provided by Rule 15 (a).

VI. *Substitution of attorney of record*

The petitions in this case were filed by Mr. E. J. Van Court, as attorney of record.

On May 31, 1935, a motion was filed by Mr. John B. Campbell, suggesting death of the attorney of record, and for his substitution as attorney of record. On June 1, 1935, said motion was allowed by the court and Mr. Campbell entered as attorney of record.

VII. *Submission of case*

On June 4, 1935, the case was submitted on merits without argument.

19 VIII. *Special findings of fact, conclusion of law and opinion of the court by Williams, J., filed December 2, 1935.*

Mr. E. J. Van Court for the plaintiff. Messrs. J. B. Campbell, W. W. Pryor, and P. M. Niebell were on the brief.

Mr. Assistant Attorney General Harry W. Blair for the defendant. Messsrs. George T. Stormont and Charles H. Small were on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

Special findings of fact

I

By an act of Congress approved May 20, 1924 (43 Stat. 133), it is provided:

"That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian Affairs, which said Seminole Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

"SEC. 2. Any and all claims against the United States within the purview of this act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of approval of this act, and such suit shall make the Seminole Nation party plaintiff and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claim or claims under contract with the Seminoles approved by the Commissioner of Indian Affairs and the Secretary of the Interior; and said contract shall be executed in their behalf by a committee chosen by them under the direction and approval of the Commissioner of Indian Affairs and the Secretary of the Interior. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said Indian nation to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys of said Indian nation.

"SEC. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation, but any payment which may have been
20 made by the United States upon any claim against the United

States shall not operate as an estoppel, but may be pleaded as an offset in such suit.

"SEC. 4. That from the decision of the Court of Claims in any suit prosecuted under the authority of this act, an appeal may be taken by either party as in other cases to the Supreme Court of the United States.

"SEC. 5. That upon the final determination of any suit instituted under this act, the Court of Claims shall decree such amount or amounts as it may find reasonable to be paid the attorney or attorneys so employed by said Indian nation for the services and expenses of said attorneys rendered or incurred prior or subsequent to the date of approval of this act: Provided, That in no case shall the aggregate amounts decreed by said Court of Claims for fees be in excess of the amount or amounts stipulated in the contract of employment, or in excess of a sum equal to 10 per centum of the amount of recovery against the United States.

"SEC. 6. The Court of Claims shall have full authority by proper orders and process to bring in and make parties to such suit any or all persons deemed by it necessary or proper to the final determination of the matters in controversy.

"SEC. 7. A copy of the petition shall, in such case, be served upon the Attorney General of the United States, and he, or some attorney from the Department of Justice to be designated by him, is hereby directed to appear and defend the interests of the United States in such case."

This act was modified by joint resolution of May 19, 1926 (44 Stat. 568), permitting plaintiff to bring separate suits on one or more causes of action, and by the act of Congress approved February 19, 1929 (45 Stat. 1229), the time for filing such suits was extended to June 30, 1930.

II

Under the provisions of said act of May 20, 1924, the original petition herein was filed on February 24, 1930, and an amended petition was filed on September 19, 1934.

III

Under the terms of article VIII of the treaty of August 7, 1856 (11 Stat. 699, 702), between the United States and the Creek and Seminole Tribes of Indians, the United States agreed in respect of the Seminoles, among other things:

"* * * to provide annually for ten years the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith shops among them",

said sums to be applied to said objects in such manner as the President should direct.

Under the provisions of said article VIII the United States further agreed, in respect of the Seminoles:

"* * * to invest for them the sum of two hundred fifty thousand dollars, at five percent per annum, the interest to be regularly paid over to them per capita as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have
21 emigrated and joined their brethren in the west, whereupon the two sums so invested, shall constitute a fund belonging to the united tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them per capita as an annuity; * * *"

Under the provisions of article IX of said treaty of August 7, 1856, the United States agreed to expend for the Seminoles then in Florida, after they had all removed to the Seminole country west, the sum of twenty thousand dollars in improvements.

IV

For each fiscal year during the ten-year period from 1858 to 1867, inclusive, Congress annually appropriated as provided by article VIII of the said treaty, the following amounts: $3,000 for support of schools; $2,000 for agricultural assistance; and $2,200 for the support of smiths and smith shops, or a total of $72,000, the amount due the Seminoles under these provisions of the treaty.

While the said amounts were duly appropriated by Congress and made available for the purposes named, only $10,436.58 of the amounts so appropriated was disbursed in payment of the above treaty obligations.

V

Payments of $25,000 per annum, interest on the $500,000 fund provided for in article VIII of the treaty of 1856, were begun in the year 1859. For the fiscal years 1861 to 1866, inclusive, Congress annually appropriated this sum for the purpose of making per capita payments to members of the Seminole Nation.

The said appropriations aggregating $150,000 were not disbursed as per capita payments to members of the Seminole Nation, but were diverted from such purposes and expended for the benefit of refugee Seminoles and refugee members of other tribes during the period of the Civil War.

VI

Commencing with the act of July 26, 1866 (14 Stat. 263, 264), up to and including the act of April 30, 1908 (35 Stat. 91), Congress annually appropriated $25,000, interest on the $500,000 fund provided in article VIII of the treaty of 1856 for the purpose of making per capita payments to members of the Seminole Nation.

The United States disbursed the sums thus appropriated for the years involved, either by making direct payment per capita to members of the tribe, or by cash payment to the treasurer of the Seminole Nation, except for the fiscal years following, in which the amounts stated were neither disbursed to members of the tribe nor paid to the Seminole national treasurer:

Year	Amount	Rep. G. A. O. page	Year	Amount	Rep. G. A. O. page
1867	$12,500.00	151	1874	$11,101.58	153
1868	450.00	151	1876	24,500.00	154
1869	.25	151	1879	454.00	155
1870	5,321.00	152	1907	12,500.00	164
1871	12,500.00	152	1908	25,000.00	164
1872	12,625.45	152	1909	25,000.00	164
1873	12,599.00	153			

22

VII

In March 1857 Congress, in fulfillment of the stipulation in article IX of the treaty, appropriated $20,000 to be expended for improvements for the Seminoles in Florida after they had removed to the Seminole country west.

The Florida Seminoles having been removed to the country west, there was disbursed for their benefit from this appropriatioi in payment for improvements the sum of $18,210.00. Report G. A. O., pages 143–145.

VIII

Article III of the treaty between the Seminole Nation and the United States of March 21, 1866 (14 Stat. 755), provides:

"* * * The balance due the Seminole Nation after making said deduction, amounting to one hundred thousand dollars, the United States agree to pay in the following manner, to wit: * * * seventy thousand dollars to remain in the United States Treasury, upon which the United States shall pay an annual interest of five per cent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools; * * *"

Article III of the treaty of March 21, 1866, contained the further provision:

"Fifteen thousand dollars shall be paid for the erection of a mill suitable to accommodate said nation of Indians."

Article VI of the said treaty of 1866 provides as follows:

"Inasmuch as there are no agency buildings upon the new Seminole reservation, it is therefore further agreed that the United States shall cause to be constructed, at an expense not exceeding ten thousand (10,000) dollars, suitable agency buildings, the site whereof shall be selected by the agent of said tribe, under the direction of

the Superintendent of Indian Affairs; in consideration whereof, the Seminole Nation hereby relinquish and cede forever to the United States one section of their lands, upon which said agency buildings shall be directed [erected], which land shall revert to said nation when no longer used by the United States, upon said nation paying a fair value for said buildings at the time vacated."

IX

Congress, for the fiscal year 1867 and each year thereafter to and including the fiscal year 1909, appropriated the sum of $2,500 for school purposes, interest on the $50,000 set aside as a permanent school fund in article III of the treaty of 1866.

For the fiscal years 1867 to 1874, inclusive, for which period $20,000 was appropriated in fulfillment of this provision of article III of the treaty, only $16,902.80 was disbursed by the defendant for the purposes of education.

Beginning with the fiscal year 1875 and each year thereafter, to and including the fiscal year 1907, the $2,500 annually appropriated by Congress under this article of the treaty, together with $1,000 interest on the $20,000 fund provided in the said article III as a fund for the maintenance of the Seminole Nation, was paid by the Secretary of the Interior direct to the Seminole tribal treasurer, except that for the year 1907 only $1,750 was so paid.

23

X

The act of July 28, 1866 (14 Stat. 319), appropriated the sum of $15,000 for the erection of a mill, as was provided in article III of the treaty of 1866.

The $15,000 so appropriated was placed in the hands of George A. Reynolds, United States Indian agent, for the purpose of purchasing and installing a suitable mill. He purchased a saw and grist mill at Fort Smith, Arkansas, and had the same transported to and erected at the Seminole Agency. The cost to the defendant of the purchase, repair, removal, and erection of the mill was $16,300. Although the testimony as to the suitability of the mill for the purposes intended is conflicting, the Seminoles vigorously protesting that it was not suitable, its erection substantially met the requirements of article III of the treaty.

XI

Congress by the act of July 28, 1866 (14 Stat. 319), appropriated the sum of $10,000 for agency buildings, pursuant to article VI of the treaty of 1866. None of this amount was used and it was subsequently returned to surplus. However, another appropriation of $10,000 to replace the amount so returned to surplus was carried in the act of May 18, 1872, 17 Stat. 132. On July 31, 1875, the sum of

$969.85 out of this appropriation was returned to surplus. It does not appear for what purpose the $9,030.15 expended out of this appropriation was used, but it was not used for the purpose of erecting agency buildings.

In the years 1870 and 1872 there was expended for "agency buildings and repairs" the sum of $931.76, but these expenditures were from general appropriations for "buildings at agencies and repairs", and were not from any sum appropriated for the specific purpose under article VI of the treaty of 1866.

XII

The Secretary of the Interior made the following payments of Seminole moneys to the Seminole tribal treasurer, as shown by the report of the General Accounting Office:

Year	Amount	Rep. G. A. O. pages
1899	$103, 500. 00	161, 197, 216.
1900	103, 788. 60	162, 198, 216, 283.
1901	103, 433. 75	162, 198, 216.
1902	103, 500. 00	162, 198, 217.
1903	103, 507. 71	163, 199, 217, 283.
1904	103, 500. 00	163, 199, 217.
1905	103, 052. 00	163, 199, 218.
1906	103, 500. 00	164, 200, 218.
1907	36, 921. 12	164, 200, 218.
Total	864, 702. 58	

24

XIII

The Secretary of the Interior disbursed the following amounts from the principal of the "Seminole School Fund":

G. A. O. Rep., page	Fiscal year	Purpose of disbursement	Amount
296	1920	Per capita payments	$25, 744. 50
296	1921	" " "	6, 701. 06
296	1921	Equalization of allotments	490. 22
297	1922	Education	17, 743. 43
297	1923	"	16, 679. 86
297	1924	"	247. 94
298	1925	"	6, 504. 72
298	1926	"	12, 809. 52
298	1927	"	17, 815. 59
299	1928	"	19, 685. 35
299	1929	"	1. 29
300	1930	"	30, 031. 82
Total			154, 455. 30

XIV

During the period from July 1, 1912 (fiscal year 1913), to 1929, the following amounts were paid by the Secretary of the Interior from the tribal funds of the Seminole Nation for "Education", which

payments were not specifically appropriated by Congress from such funds:

G. A. O. Rep., pages	Fiscal year	Amount	Totals
284	1913	$531.44	
284	1914	903.65	
285	1915	502.32	
285	1916	484.40	
285	1917	147.82	
286	1918	1,146.73	
286	1919	2,433.88	
286	1920	2,705.60	
287	1921	1,917.64	
287	1922	2,945.62	
287	1923	1,571.13	
288	1924	18,628.92	
288	1925	11,804.20	
288	1926	218.45	
289	1927	2,996.54	
289	1928	1,463.04	$50,401.38
"INTEREST ON SEMINOLE MONEYS ON DEPOSIT IN BANKS"			
291	1919	$267.20	
292	1923	791.50	$1,058.70
Total			51,460.08

Congress by the acts of March 7, 1928 (45 Stat. 200, 216), and March 4, 1929 (45 Stat. 1562, 1577), respectively, limited disbursements from Seminole trust funds for education for the years 1929 and 1930 to a total of $33,000 for each year.

The Secretary of the Interior paid out of the said trust funds for education, in excess of the amount authorized, $1,952.25 for the year 1929, and $1,957.71 for the year 1930.

25

XV

The Secretary of the Interior made the following payments from the Seminole trust funds without specific appropriations therefor:

Fiscal year	Fund	Insurance	Construction and repair of buildings
1913	Interest on Seminole School Fund		761.14
1914	" " "		1,089.09
1915	" " "	443.70	1,461.31
1916	" " "		593.50
Total		443.70	3,905.04

XVI

Because of certain errors made by the defendant in keeping with books in respect to the plaintiff's funds, some of which were in favor of the plaintiff and some against it, there is a balance due the plaintiff in the sum of $1,350.35.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover $1,317,087.27.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of one million three hundred seventeen thousand eighty-seven dollars and twenty-seven cents ($1,317,087.27).

Opinion

WILLIAMS, Judge, delievered the opinion of the court:

The jurisdictional act under which suit is brought is set out in finding 1.

The jurisdiction of the court to hear and determine the issues presented in the amended petition, filed on September 19, 1934, is not questioned by the defendant. The claim is one of accounting, except as to one item, and in the main is similar to the claim presented in The Creek Nation v. United States, 78 C. Cls. 474.

The claim grows out of the provisions of treaties between the United States and the Seminole Nation of Indians of the dates of August 7, 1856 (11 Stat. 699), and March 21, 1866 (14 Stat. 755), and numerous acts of Congress which will be referred to in connection with the particular items of the claim to which they apply.

The report of the General Accounting Office contains a complete and admirably arranged statement of the relevant treaties and statutes, also a detailed recital of all appropriations made by Congress in fulfillment of the various treaty obligations, and an itemized account of disbursements made of such appropriations by the Secretary of the Interior. The special findings of fact are based on the figures shown in the report and, while not arranged in the exact order in which the various items of the claim are presented in the petition and the plaintiff's suggested findings of fact, present
26 a concise and easily comprehended statement of the material facts upon which the claim is based.

The plaintiff's claim in the aggregate amounts to $1,746,013.23, and consists of items falling generally within two classes:

1. Items as to which it is alleged that the United States failed to make payments in the amounts and in the manner provided by its treaties and agreements with the Seminole Nation.

2. Items as to which it is alleged payments were made by the Secretary of the Interior out of Seminole trust funds without authority of law.

These items will be considered in the order in which the facts upon which they are based are set forth in the special findings of fact.

Item 1 (finding IV), amount claimed $61,563.42. In the treaty of August 7, 1856, between the United States and the Creek and Seminole Tribes of Indians, the United States in respect to the Sem-

inoles agreed to provide annually for a period of ten years: $3,000 for the support of schools, $2,000 for agricultural assistance, and $2,200 for the support of smiths and smith shops. This obligation entailed a total expenditure for the purposes named of $72,000 for the ten-year period. Congress annually appropriated the moneys due the Seminoles under this provision but only $10,436.58 of the amount appropriated was disbursed for the purposes named in the treaty. This the defendant concedes.

The defendant says that, notwithstanding the fact that the full amount due was not provided for the purposes named in the treaty, there is no balance due the plaintiff on that account for the reason that the defendant was authorized by the act of July 5, 1862 (12 Stat. 512, 528),[1] and the appropriation acts of March 3, 1863 (12 Stat. 793), June 25, 1864 (13 Stat. 180), and March 3, 1865 (13 Stat. 562), to divert these funds from the purposes for which they were appropriated and to disburse the same for the relief of loyal refugee Indians of the Seminole and other Indian tribes, and that this was done. It is also contended that this action was later ratified by article VIII of the treaty of 1866, which provided:

"The stipulations of this treaty are to be a full settlement of all claims of said Seminole nation for damages and losses of every kind growing out of the late rebellion, and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose, con-
27 sequent upon the late war with the so-called confederate states. And the Seminoles hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Seminole nation by the United States. * * *"

The act of July 5, 1862, supra, was operative only "during the discretion and pleasure of the President." It is not shown that the President ever took any action under this statute either by declaring by proclamation the abrogation of "all treaties" with the Seminoles, or by directing that "appropriations heretofore or hereafter made" to carry into effect treaty stipulations with them "be suspended and postponed wholly or in part." Without action on the part of the President the act by its own terms was ineffective.

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1 "* * * That all appropriations heretofore or hereafter made to carry into effect treaty stipulations, or otherwise, in behalf of any tribe or tribes of Indians, all or any portion of whom shall be in a state of actual hostility to the Government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, may and shall be suspended and postponed wholly or in part, at and during the discretion and pleasure of the President: Provided, further, That the President is authorized to expend such part of the amount heretofore appropriated and not expended and hereinbefore appropriated for the benefit of the tribes named in the preceding proviso as he may deem necessary, for the relief and support of such individual members of said tribes as have been driven from their homes and reduced to want on account of their friendship to the Government. And an account shall be kept of the sums so paid for the benefit of such tribe, which account shall be rendered to Congress at the commencement of the next session thereof. And all purchases of articles for the purposes above set forth, shall be made on advertisement, as provided in other cases, and an account shall be rendered of all such purchases, with a statement of the prices paid therefor: And provided further, That in cases where the tribal organization of any Indian tribe shall be in actual hostility to the United States, the President is hereby authorized, by proclamation, to declare all treaties with such tribe to be abrogated by such tribe, if, in his opinion, the same can be done consistently with good faith and legal and national obligations."

The release stipulated in article VIII of the treaty of 1866, insofar as it relates to the diversion of Seminole funds by the Secretary of the Interior during the War of the Rebellion, covers only the diversion of annuity payments. As to these funds the Seminole Nation ratified and confirmed "all such diversions of annuities heretofore made from the funds of the Seminole Nation by the United States." The United States had diverted the sum of $249,731.88 of Seminole moneys during the period of the Civil War—from the fiscal years 1862 to 1866—an amount largely in excess of the amount of annuity funds diverted. Had the release been intended to ratify and confirm the diversion of other than the annuity payments, we think such intention would have been expressly stated. The general language, "The stipulations of this treaty are to be a full settlement of all claims of said Seminole Nation for damages and losses of every kind growing out of the late Rebellion", has no application and cannot be held to include this item of the Seminole claim for the reason that substantially the whole amount claimed was due and unpaid before the outbreak of the war and consequently is not one for "damages and losses growing out of the War of the Rebellion." The simple facts are that the United States covenanted with the Seminole Tribe in article VIII of the treaty of 1856, as a part of the consideration for the treaty, to provide annually for them for a period of ten years fixed sums for the support of schools, for agricultural assistance, and for the support of smiths and smith shops among them. In the absence of subsequent specific enactment by Congress to the contrary, the United States was obligated to disburse the funds stipulated in the manner and for the purposes designated in the treaty. The United States failed to discharge this treaty obligation in full, having disbursed only a part of the amount for the purposes named in the treaty. The plaintiff tribe is entitled to recover the undisbursed balance of $61,563.42.

Item 2 (finding V), amount claimed, $150,000. The United States agreed in article VIII of the treaty of 1856 to invest for the Seminole Nation the sum of $250,000, at five percent per annum, and to invest the further sum of $250,000 in like manner whenever the Seminoles then remaining in Florida had emigrated and joined their brethren in the west, whereupon the two sums so invested were to constitute a fund belonging to the united tribe of Seminoles, the interest on which "at the rate aforesaid, shall be annually paid over to them per capita as an annuity."

28 There is no controversy as to the payment of the annuity thus provided prior to the fiscal year 1861. But beginning with that year, and up to and including the fiscal year 1866, no part of the $25,000 annually due, amounting to $150,000, was disbursed per capita to members of the tribe, although the amount due was annually appropriated by Congress for that purpose, the whole of such appropriations, together with other Seminole funds, being dis-

bursed for the relief of loyal refugee members of the Seminole and other tribes of Indians.

The plaintiff, we think, is clearly precluded from recovery as to this item of its claim by reason of the stipulations in article VIII of the treaty of 1866, heretofore set out. In comprehensive and unqualified terms the Seminole Nation ratified and confirmed "all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose, consequent upon the late war with the so-called Confederate States." The diversions complained of had all been made when this provision was incorporated in the treaty of 1866, and the ratification and confirmation by the Seminoles of "all such diversions of annuities heretofore made" bar the plaintiff tribe from now asserting claim for the annuity payments so ratified and confirmed by it.

Item 3 (finding VI), amount claimed $154,551.28. This item is also based on the agreement of the United States in article VIII of the treaty of 1856 to pay annually to the Seminole Nation, per capita as an annuity, the $25,000 interest due on the united Seminole fund of $500,000.

The amount due under this provision of the treaty was annually appropriated by Congress for the fiscal years 1867 to 1909, inclusive. The Secretary of the Interior, however, failed to disburse certain of the amounts so appropriated, as shown in finding VI, by either making per capita payments to members of the tribe or paying the same over to the Seminole tribal treasurer, amounting in all to $154,551.28. The plaintiff concedes that payment of these funds into the Seminole tribal treasury during the fiscal years 1875 to and including the fiscal year 1898 was authorized by the act of April 15, 1874 (18 Stat. 29). Claim is made in another item, subsequently to be considered, for the payments made into the tribal treasury subsequent to the fiscal year 1898. Recovery, therefore, under this item is sought only of the amount of the underpayments for the years named, either by direct per capita payments to members of the tribe or by payment into the tribal treasury.

The defendant says that even if the funds in question were not disbursed in strict accordance with the terms of the treaty, they were expended for the benefit of the plaintiff tribe, and that no damage resulted to the tribe from the "diversion" of the funds, even if unauthorized. It is urged that if the United States be technically liable, the tribe having received the benefit of the expenditures, there arises in favor of the United States an equitable counterclaim for the same amount, which the court under section 3 of the jurisdictional act is authorized to pass upon. This contention was urged under like circumstances in The Creek Nation v. United States, supra, and was rejected by the court. Section 3 of the
29 jurisdictional act authorizes the court to "hear, examine, consider, and adjudicate any claims which the United States may

have against said Indian Nation." "Claims" as used in the section, of course, can mean only legal claims which the United States asserts by way of counterclaim. The United States has asserted no counterclaim, hence there is no claim against the plaintiff tribe which the court is authorized to "hear, examine, consider, and adjudicate." Even if the plaintiff received the benefit of the payments, and that fact is not established, they were payments made outside of the provisions of the treaty and as such were gratuities which the court under the jurisdictional act is without authority to offset against the plaintiff's claim.

The treaty stipulations as to the manner and the purposes for which the annuity payments be expended were as much a part of the treaty and as binding on the United States as was the provision fixing the amount to be paid. Furthermore, section 2097 of the Revised Statutes (act of July 26, 1866, 14 Stat. 280) prohibited disbursement in any other manner:

"No funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner not authorized by such treaty, or by express provisions of law; nor shall money appropriated to execute a treaty be transferred or applied to any other purpose, unless expressly authorized by law."

The United States failed to disburse the full amount of the annuity payments due the plaintiff for the years in question in the manner and for the purposes named in the treaty, although the full amounts due were appropriated by Congress for that purpose. It is no defense to say, even if the fact was shown, that they were paid out for other purposes for which the tribe received the benefit.

The plaintiff is therefore entitled to recover the amount of the underpayments set forth in finding VI, $154,551.28.

Item 4 (finding VII), amount claimed, $1,790. The United States agreed in article IX of the treaty of 1856 to expend the sum of $20,000 for improvements for the Seminoles then in Florida after they had removed to the Seminole country west. Congress appropriated the $20,000 provided for in this article of the treaty but only $18,210 of the appropriation was expended for the purposes specified. The plaintiff is entitled to recover the undisbursed balance, $1,790.00.

Item 5 (finding IX), amount claimed, $90,597.20. Article III of the treaty of 1866, among other things, provided that of the balance due the Seminole Nation under the treaty, the sum of $50,000 "shall be a permanent school fund, the interest of which [five percent per annum] shall be paid annually and appropriated to the support of schools." Congress annually, beginning with the fiscal year 1867 to and including the fiscal year 1909, appropriated the $2,500 interest due under this provision of the treaty. For the fiscal years 1867 to 1874, inclusive, there was disbursed for school purposes from the sums so appropriated the sum of $16,902.80 only, although the amount due for that period and duly appropriated by Congress was

$20,000. Beginning with the fiscal year 1875 down to and including the fiscal year 1907, the annual amount due and appropriated was paid by the Secretary of the Interior to the Seminole tribal treasurer, except that for the fiscal year 1907 only $1,750 was so paid.

The plaintiff in another item makes claim for the payments made by the Secretary of the Interior to the Seminole tribal treasurer subsequent to the fiscal year 1898. These years will therefore be eliminated in the consideration of this item, leaving only for determination the plaintiff's right to recover the amount of the underpayments for the years 1867 to 1874, inclusive, the amounts paid to the Seminole tribal treasurer for the years 1875 to 1898, inclusive, and the underpayment to the tribal treasurer for the year 1907.

Payments made by the Secretary of the Interior to the Seminole tribal treasurer of the annual interest due the plaintiff for school purposes under the treaty of 1866 were unauthorized. While the Creek Nation under the terms of the treaty of 1856 had been vested with the power to disburse certain of their tribal funds by tribal officials, and the payment of such funds was authorized to be made to the tribal treasurer for that purpose, no such provision was made in respect to the Seminole Nation in that or any subsequent treaty.

The Secretary of the Interior in a supplemental report to the Attorney General, on March 22, 1935, said in respect to these payments:

"There has nothing been found in the records to show why these amounts were turned over to the Treasurer, but inasmuch as a part of the annuities was for the support of the Seminole government, and the Act of 1874 provided for a five thousand dollar appropriation for the school fund, the entire annuity under the 1856 treaty was so used. The treaty of 1866 provided for a government for the Seminole Nation and the annuities were all used for the support of such government and for the schools which were established in their country and conducted for their benefit."

The act of April 15, 1874, to which the Secretary refers in his report, conferred authority on the Commissioner of Indian Affairs, with the sanction of the Secretary of the Interior and the President of the United States, to expend annuities, interest, or other moneys then or thereafter due to the Seminole Tribe of Indians under article VIII of the treaty of 1856 "for such objects as will best promote the comfort, civilization, and improvement of the Seminole Indians" or "to pay such annuities or any part thereof into the treasury of the Seminole Nation to be used as the council of the same shall provide, instead of paying the same per capita according to the terms of said treaty." The act further provided that the consent of the tribe "to such expenditures and payment shall be first obtained" and the agreement shall provide "that the sum of five thousand dollars shall be annually appropriated out of said annuity to the school fund of said tribe." Since this act by its terms applied solely to "annuities,

interest, or other moneys" then or thereafter to become due under article VIII of the treaty of 1856, it is clear that it did not and could not authorize the like disposition of interest due the plaintiff under the treaty of 1866. Congress at the time of the enactment knew that the interest in question was annually due the plaintiff under the terms of the treaty of 1866, and that appropriations for the same were being regularly made. Neither the act of 1874 nor any subsequent act of Congress conferred authority on the Secre-
31 tary of the Interior to disburse moneys due the plaintiff tribe under the treaty of 1866 in any manner other than that provided in the treaty.

The treaty provided that the interest on the permanent school fund of $50,000 be "paid annually and appropriated to the support of schools." Congress never authorized disbursements of this fund to be otherwise made. It follows that the plaintiff is entitled to recover the amount of the unauthorized payments to the tribal treasurer during the years 1875 to 1898, inclusive, $57,500, also the amount of the underpayments for the years 1867 to 1874, inclusive, $3,097.20, and the underpayment of $750.00 for the fiscal year 1907, amounting in all to $61,347.20.

Item 6 (finding X), amount claimed, $15,000. This claim is for $15,000, which the third article of the treaty of 1866 provided to be paid for the erection of a mill "suitable to the needs" of the Seminole Nation. The $15,000 was appropriated by Congress and turned over to an Indian agent. He purchased a combined saw and grist mill and had it erected at the Seminole Agency. The evidence submitted does not justify a finding that the mill was not suitable to the needs of the Seminole Nation and that its erection did not discharge the defendant's treaty obligations in that respect. The plaintiff, therefore, is not entitled to recover on this claim.

Item 7 (finding XI), amount claimed, $10,000. The United States agreed in article VI of the treaty of 1866 to cause to be constructed, at an expense not exceeding $10,000, suitable agency buildings, in consideration of which the Seminole Nation relinquished and ceded to the United States one section of their lands, upon which the agency buildings should be erected. Congress in 1866 appropriated the sum of $10,000 for agency buildings provided in the treaty. None of this amount, however, was used for that purpose, and the whole of the appropriation was subsequently returned to surplus. In 1872 Congress again appropriated the sum of $10,000 to replace the amount of the previous appropriation. In July 1875 the sum of $969.85 of this appropriation was returned to surplus. It is not shown for what purposes the $9,030.15 expended out of this appropriation was used, but it appears that none of it was used for the purpose of erecting agency buildings.

In the years 1870 and 1872 there was expended for "agency buildings and repairs" the sum of $931.76 out of a general appropriation for "buildings at agencies and repairs." While these expenditures

were not made out of the specific funds provided for in the treaty but from other funds of the tribe, we think the defendant is entitled to have this sum credited against its treaty obligations to erect suitable agency buildings, as the amount may reasonably be considered as having been expended for the purposes designated in the treaty. The plaintiff is entitled to recover the balance not so disbursed, $9,068.24.

Up to this point the items considered are based on the alleged failure of the United States to make payments of the sums due the plaintiff under its treaties with the United States, in the amounts and in the manner provided by such treaties. The defendant in the brief concedes that the amounts claimed were not disbursed for the purposes named in the treaties under which the claims arose, except as to the claim of $15,000 for the erection of a mill.

32 In determining the plaintiff's right to recover as to these items, we have applied the rule that an Indian tribe is entitled to have the full amount due it under the terms of a treaty with the United States disbursed in the manner and for the precise purposes named in the treaty, unless Congress by subsequent legislation provides that payments be otherwise made, and that the United States is liable to the tribe for the balance of any moneys not so disbursed and expended.

We now come to the consideration of the items of the claim where it is alleged disbursements of Seminole trust funds were made by the Secretary of the Interior without authority of law. In the consideration of these items the rule stated in The Creek Nation v. United States, supra, will be applied:

"That Congress has plenary power over the administration of Indian affairs is well settled. Cherokee Nation v. Georgia, 5 Pet. 1; Cherokee Nation v. Hitchcock, 187 U. S. 294; Lone Wolf v. Hitchcock, 187 U. S. 553. The Secretary of the Interior has only such authority over the funds of Indian tribes as is confided in him by Congress. He cannot legally disburse and pay out Indian funds for purposes other than those authorized by law. This rule is the test by which the legal right of the Secretary of the Interior to make the disbursements involved must be determined."

Item 8 (finding XII), amount claimed, $864,702.58. Recovery is sought under this item of payments made by the Secretary of the Interior out of the Seminole tribal funds to the Seminole tribal treasurer subsequent to the passage of the Curtis Act, June 28, 1898, aggregating the sum of $864,702.58.

Prior to the passage of the Curtis Act, the Seminole Nation and other Indians constituting the Five Civilized Tribes largely controlled their own affairs independent of the Federal Government, maintaining governments of their own, electing their principal chief and council and other tribal officers. These governments maintained courts, police, and schools, collected taxes, and under various treaty provisions and acts of Congress were entrusted with the disburse-

ment of certain of the tribal income due them from the United States, payments of which were authorized to be made to the respective tribal treasurers. As we have seen, the act of April 15, 1874, authorized payment of certain moneys due the Seminole Nation under article VIII of the treaty of 1856 into the Seminole tribal treasury to be used as "the council of the same shall provide, instead of paying the same per capita according to the terms of the said treaty." Also the act of March 2, 1889 (25 Stat. 980, 1004), authorized payment into the Seminole tribal treasury semiannually five per cent interest on the sum of $1,500,000 remaining in the Treasury of the United States to the credit of the tribe as part of the consideration paid for the release and conveyance of certain of their lands. Under these two acts large sums due the Seminoles from the United States were paid to the Seminole tribal treasurer and disbursed by its tribal authorities according to the laws of the tribe. The same situation prevailed as to other tribes of the Five Civilized Nations.

Long before the passage of the Curtis Act, the utter inefficiency of the Indian tribal governments had been demonstrated and was universally recognized. It was also a matter of common
33 knowledge throughout the Indian country that they were notoriously and incurably corrupt, and that every branch of the service was infested with favoritism, graft, and crookedness of every kind. The Dawes Commission, in one of its early reports to Congress (1894), in speaking of these tribal governments and the prevailing conditions existing under them, said:

"Corruption of the grossest kind, openly and unblushingly practiced, has found its way into every branch of the service of the tribal governments. All branches of the governments are reeking with it, and so common has it become that no attempt at concealment is thought necessary. The governments have fallen into the hands of a few able and energetic Indian citizens, nearly all mixed blood and adopted whites, who have so administered their affairs and have enacted such laws that they are enabled to appropriate to their own exclusive use almost the entire property of the Territory of any kind that can be rendered profitable and available.

* * * * * * *

"The large payments of moneys to the Indians of these tribes within the last few years have been attended by many and apparently well-authenticated complaints of fraud, and those making such payments, with others associated with them in the business, have, by unfair means and improper use of the advantages thus afforded them, acquired large fortunes, and in many instances private persons entitled to payments have received but little benefit therefrom. And worse still is the fact that the places of payments were thronged with evil characters of every possible caste, by whom the people were swindled, defrauded, robbed, and grossly debauched and demoralized. And in case of further payments of money to them the Government

should make such disbursements to the people directly, through one of its own officers.

* * * * * * *

"Justice has been utterly perverted in the hands of those who have thus laid hold of the forms of its administration in this Territory and who have inflicted irreparable wrongs and outrages upon a helpless people for their own gain."

The Curtis Act and succeeding acts of Congress had for their purpose the creation of correct membership rolls of the Five Civilized Tribes, the allotment of their tribal lands in severalty, the sale of the surplus remaining lands after allotments had been made, the equalization of allotments, the per capita distribution of the remaining tribal funds, the final winding up of tribal affairs and the ultimate dissolution of the tribal governments. As a part of this comprehensive general program it was provided by section 19 of the Curtis Act:

"That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

34 The undoubted purpose of this provision was to forever put an end to the intolerable conditions brought about by permitting the tribal governments to receive and disburse tribal moneys due them from the United States. It was to prevent unscrupulous tribal officers and corrupt designing persons associated with them from diverting to their own use and profit tribal funds, the common property of the tribe, and to insure that all members of the tribe would receive an equal share in the distribution of such funds. No more wholesome or humane provision was ever written into an Indian statute, and the Seminole Indians were entitled to its protection in the distribution of all tribal income due them from the United States. This protection, however, was not afforded them, and a continuation of the "irreparable wrongs and outrages upon a helpless people" was made possible by payment thereafter of large sums of their tribal funds to the tribal treasurer.

The defendant says that section 19 of the Curtis Act was not applicable to the Seminole Nation for the reason that the agreement negotiated November 16, 1897, between the United States and the Seminole Nation approved and ratified on July 1, 1898 (30 Stat. 567), "superseded and repealed any and all provisions of the Curtis Act inconsistent therewith" and that the said agreement "did not in anywise affect the provisions of the then existing treaties between the Seminole Nation and the United States, except insofar as such pro-

visions might be inconsistent therewith." This contention assumes, necessarily, we think, that the right of the Seminole Nation to have moneys due it from the United States paid into the Seminole tribal treasury was secured to the tribe by then existing treaty provisions. This is not the case. No such provision is found in any treaty between the United States and the Seminole Nation. The right of the Secretary of the Interior to pay Seminole tribal funds into the tribal treasury, as well as the right of the tribal authorities to receive and disburse such funds was purely statutory, created by the acts of April 15, 1874, and March 2, 1889, heretofore referred to. These acts were repealed by section 19 of the Curtis Act and were nonexistent when the Seminole agreement was ratified on July 1, 1898. There is nothing in the agreement inconsistent with the provisions of section 19 of the Curtis Act, and the contention that the effect of the agreement was to repeal or supersede the provisions of this section is without merit.

Immediately following the passage of the Curtis Act, Hon. Willis Van Devanter, then Assistant Attorney General, now an Associate Justice of the Supreme Court, advised the Secretary of the Interior in a written opinion that section 19 of the Curtis Act applied to the Seminole Nation. The Assistant Attorney General, after reviewing various sections of the Curtis Act, and the act of July 1, 1898, said:

"I have therefore to advise that section 19 of the act of June 28, 1898, applies to the Seminole Nation of Indians. Moreover, it results from what has been hereinbefore said that whether that act applies or not, the manner of disbursement under the Seminole act must be the same."

While this opinion was not controlling as to the action of the Secretary of the Interior, and was shortly thereafter withdrawn by the Assistant Attorney General for that reason, it was a correct decision of the legal question presented—a decision by an outstanding authority on the interpretation of Indian treaties and laws.

The Secretary of the Interior was therefore without legal authority to pay Seminole tribal funds into the Seminole tribal treasury. More than that he was plainly prohibited by the law from doing so. The payments being clearly illegal, the plaintiff is entitled to recover the amount shown by finding XII, which is the sum of $864,702.58.

Item 9 (finding XIII), amount claimed, $154,455.30. It was provided in the original Seminole agreement, ratified by act of Congress of July 1, 1898 (30 Stat. 567), that:

"Five hundred thousand dollars ($500,000) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five percent interest, or invested so as to produce such amount of interest, which shall be, after extinguishment of tribal government,

applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of the Seminole people; and there shall be selected and excepted from allotment three hundred and twenty acres of land for each of said academies and eighty acres each for eight district schools in the Seminole country."

Pursuant to the foregoing provision, the sum of $500,000 was transferred from the "Seminole General Fund" and set up on the books of the United States Treasury to the credit of the Seminole Nation under the heading "Seminole School Fund." The fund under the provisions of the agreement was to be a "permanent school fund" for the education of children of members of the Seminole tribe, the Secretary of the Interior being authorized to apply only the interest thereon for that purpose. He could not under the terms of the agreement expend any part of the principal fund for education or for any other purpose.

During the fiscal years 1920 to and including 1930, the Secretary disbursed out of the principal of this fund for the purposes of per capita payments, equalization of allotments and education the sum of $154,455.30. That Congress had the power to change the terms of the agreement and authorize these payments, is well established, but we find no act of Congress that either in express terms or by necessary implication authorizes any of them. It must, therefore, be held that they were illegally made and that the Seminole "permanent school fund"—a trust fund—was unlawfully depleted thereby. The plaintiff is entitled to recover the sum claimed, $154,455.30.

Item 10 (finding XIV), amount claimed, $51,460.08. The Secretary of the Interior, during the fiscal years 1913 to 1928, inclusive, expended for "education" out of the tribal funds of plaintiff the sum of $51,460.08, no part of which was specifically appropriated by Congress.

Section 18 of the Indian Appropriation Act for the fiscal year beginning July 1, 1912 (37 Stat. 518), contained the following provision:

"SEC. 18. Provided, That during the fiscal year ending June thirtieth, nineteen hundred and thirteen, no moneys shall be expended from the tribal funds belonging to the Five Civilized Tribes without specific appropriation by Congress, except as follows: Equal-
36 ization of allotments, per capita and other payments authorized by law to individual members of the respective tribes, tribal and other Indian schools for the current fiscal year under existing law, salaries, and contingent expenses of governors, chiefs, assistant chiefs, secretaries, interpreters and mining trustees of the tribes for the current fiscal year, and attorneys for said tribes employed under contract approved by the President, under existing law, for the current fiscal year: * * *"

This provision was continued in each annual appropriation act until the act of May 24, 1922 (42 Stat. 575), which act contained the tially the same provision.

"'* * * Provided further, That the Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the * * * and Seminole tribes from the tribal funds of those nations, within his discretion and under such rules and regulations as he may prescribe: Provided, further, That hereafter no money shall be expended from tribal funds belonging to the Five Civilized Tribes without specific appropriation by Congress: Provided further, That for the current fiscal year money may be so expended from such tribal funds for * * * tribal and other Indian schools under existing law, * * *."

Each annual Indian appropriation act thereafter during the period covered by this item of the plaintiff's claim contained substantially the same provision.

In The Creek Nation v. United States, supra, it was held that all payments made by the Secretary of the Interior out of the Creek tribal funds, subsequent to July 1, 1912, without specific appropriations by Congress were illegally made except such payments as fell within the exceptions enumerated in these several acts. It was also held that "disbursements for education come within the exceptions to the proviso contained in the act of August 24, 1912, and similar provisions of succeeding acts." It is not shown that any of the payments complained of were in excess of the amount authorized to be expended for the purposes of education for the years in which they were made. We think the payments were authorized by law and that the plaintiff is not entitled to recover in respect to any of them.

Item 11 (finding XIV), amount claimed, $3,909.96. Congress in the Indian appropriation acts for the fiscal years 1929 and 1930, limited disbursements for Seminole funds for "education" to a total of $33,000 for each of the years. Notwithstanding this limitation, the Secretary of the Interior disbursed for "education" the sum of $34,952.25 for the fiscal year 1929, and the sum of $34,957.71 for the fiscal year 1930. These excessive disbursements were made in violation of plain provisions of law and were unauthorized and illegal. The plaintiff is therefore entitled to recover the sum of $3,909.96, the amount of the illegal disbursement of its funds for the two years.

Item 12 (finding XV), amount claimed, $4,348.74. The Secretary of the Interior expended out of the Seminole funds during the fiscal years 1913, 1914, 1915, and 1916 the sum of $4,348.74 for insurance and the construction and repair of buildings, without specific appropriation therefor by Congress. These payments were not only made without authority of law, but were made in violation of
37 law prohibiting them. Creek Nation v. United States, supra. The plaintiff is therefore entitled to recover the sum claimed, $4,348.74.

Item 13 (finding XVI), amount claimed, $178,533.42. The plaintiff in the petition alleges that certain amounts are due because of errors made by the defendant in keeping the books of account of plaintiff's funds, the amounts claimed not being stated. In its suggested findings of fact the plaintiff enumerates the alleged errors,

the specific amounts claimed, and the pages on which the entries appear in the report of the General Accounting Office. The aggregate amount claimed in the suggested findings is $178,533.42.

Careful consideration of the various book entries set forth in the suggested finding does not warrant the conclusion that they are errors in bookkeeping. In fact it appears that as to most of the items the entries were correctly made and set forth the actual disposition of the funds involved. It may be that many of the items reflect unauthorized disbursements of the plaintiff's funds, and if so they constitute distinct claims upon which recovery could be had if established by proof. But the court is not able to find from the bare record that the entries were erroneously made on the defendant's books. However, the defendant concedes, that certain of the entries, both in respect to the credits and debits, were erroneously made, resulting in a loss to the plaintiff of the sum of $1,350.55, which amount the plaintiff is entitled to recover.

Upon the whole case it is held that the plaintiff is entitled to recover the sum of $1,317,087.27 and a judgment for that amount is hereby awarded.

It is so ordered.

WHALEY, Judge; LITTLETON, Judge; GREEN, Judge; and BOOTH, Chief Justice, concur.

38 IX. *Judgment*

At a Court of Claims held in the City of Washington on the 2nd day of December, A. D. 1935, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of one million three hundred seventeen thousand eighty-seven dollars and twenty-seven cents ($1,317,087.27).

X. *Further substitution of attorney of record*

On motion made by Paul M. Niebell, Esq., on January 8, 1936, and allowed by the court January 21, 1936, and consented to by Mr. John B. Campbell, the present attorney, Paul M. Niebell, Esq., was substituted as attorney of record.

XI. *Proceedings after entry of judgment*

On January 18, 1936, the defendant filed a motion for extension of time (15 days) within which to file a motion for a new trial, or for permission to file motion for new trial in typewritten form.

On January 21, 1936, the court allowed 15 days to file printed motion for new trial.

On February 6, 1936, the defendant filed a printed motion for new trial.

On March 2, 1936, the court entered the following order on said motion:

It is ordered this 2nd day of March, A. D. 1936, that the defendant's motion for new trial be and the same is hereby overruled.

39 On May 13, 1936, the defendant filed a motion for leave to file a second motion for new trial, which is as follows:

MOTION FOR LEAVE TO FILE SECOND MOTION FOR NEW TRIAL

Comes now the defendant, by its Assistant Attorney General, and pursuant to R. S. Sec. 1088, Judicial Code, Sec. 175, U. S. C., Title 28, Sec. 282, respectfully prays leave to file the attached motion for new trial in this case.

HARRY W. BLAIR,
Assistant Attorney General.

Said motion was allowed by the Court May 18, 1936.

On May 18, 1936, the defendant filed a second motion for new trial, and same was ordered to the June Law Calendar for argument.

XI. *Argument and submission of second motion for new trial*

On June 1, 1936, the defendant's second motion for new trial was argued and submitted by Mr. Charles E. Wyzanski, Jr., for defendant, and by Mr. Paul M. Niebell.

XII. *Order overruling defendant's second motion for new trial*

It is ordered this 8th day of June 1936, that the defendant's second motion for new trial be and the same is hereby overruled.

40 XIII. *Motion for designation of record for petition for writ of certiorari*

Filed June 23, 1936

Comes now the defendant, by its Assistant Attorney General, and moves that the court direct the clerk of the court to include in the transcript of the record of this case, heretofore applied for, to be used in connection with defendant's petition for a writ of certiorari, copies of the following documents and papers:

(a) The original petition herein; and

(b) Pages 161, 162, 163, 164, 197, 198, 199, 200, 216, 217, 218, and 283, of the report of the General Accounting Office filed herein. (Photostat copies of same supplied.)

Defendant shows that the original petition filed herein is an essential part of the record in view of the fact that the amended petition was filed subsequent to the time permitted by the jurisdictional act approved May 20, 1924 (43 Stats. 133) as modified by joint resolution

of May 19, 1926 (44 Stats. 568), for filing claims pursuant
41 thereto, and that the jurisdiction of the court is therefore limited to claims which were asserted in the original petition.

Defendant further shows that pages 161, 162, 163, 164, 197, 198, 199, 200, 216, 217, 218, and 283, have by reference in Finding XII of the court been made a part of said finding and the same are therefore material in the consideration of the matters referred to in said finding.

Respectfully submitted.

(Signed) HARRY W. BLAIR,
Assistant Attorney General.

IV. *Order allowing motion for designation of record*

It is ordered this 27th day of June 1936, that the defendant's motion for designation of record for petition for writ of certiorari, filed June 23, 1936, be and the same is hereby allowed.

42 XV. *Documents and papers referred to in motion of June 23, 1936, and included in this record*

DISBURSEMENT SCHEDULE NO. 42 (Continued)

Treaty of August 7, 1856, 11 Stat. 699	Fiscal year		
	1897	1898	1899
Article 8:			
Cash payments to Seminole Treasurer	$25,000.00	$25,000.00	$25,000.00
Total	$25,000.00	$25,000.00	$25,000.00

(Continued on next page)

43 DISBURSEMENT SCHEDULE NO. 42 (Continued)

Treaty of August 7, 1856, 11 Stat. 699	Fiscal year		
	1900	1901	1902
Article 8:			
Cash payments to Seminole Treasurer	$25,000.00	$25,000.00	$25,000.00
Total	$25,000.00	$25,000.00	$25,000.00

(Continued on next page)

44 DISBURSEMENT SCHEDULE NO. 42 (Continued)

Treaty of August 7, 1856, 11 Stat. 699	Fiscal year		
	1903	1904	1905
Article 8:			
Cash payments to Seminole Treasurer	$25,000.00	$25,000.00	$25,000.00
Total	25,000.00	25,000.00	25,000.00

(Continued on next page.)

45 DISBURSEMENT SCHEDULE NO. 42 (Continued)

Treaty of August 7, 1856, 11 Stat. 699	Fiscal year		Total
	1906	1907	
Article 8:			
Payment for improvements, and expenses of removal and establishment			$90,000.00
Per-capita payments			242,438.45
Support of blacksmiths			5,158.58
Agricultural aid			2,278.00
Expenses of delegations			500.00
Payment of drafts on Seminole Nation			11,101.64
Cash payments to Seminole Treasurer	$25,000.00	$12,500.00	715,228.91
Education			3,000.00
Cash payments to individuals			17,821.00
Article 9:			
Removal and subsistence of Indians			73,510.65
Blankets			1,439.25
Powder and lead			229.00
Shoes			247.20
Tobacco			173.60
Strouding			6.25
Rifles			807.70
Agricultural implements and equipment			1,475.63
Axes			634.00
Plows			618.75
Seeds			271.62
Payment for improvements			18,210.00
Carried forward	25,000.00	12,500.00	1,235,150.23

46 DISBURSEMENT SCHEDULE NO. 46 (Continued)

Treaty of March 21, 1866, 14 Stat. 755	Fiscal year		
	1897	1898	1899
Article 3:			
Cash payments to Seminole Treasurer	$3,500.00	$3,500.00	$3,500.00
Total	3,500.00	3,500.00	3,500.00

(Continued on next page)

47 DISBURSEMENT SCHEDULE NO. 46 (Continued)

Treaty of March 21, 1866, 14 Stat. 755	Fiscal year		
	1900	1901	1902
Article 3:			
Cash payments to Seminole Treasurer	$3,500.00	$3,500.00	$3,500.00
Articles 3 and 4:			
Cash payments to loyal Seminoles for losses incurred during Civil War		186,000.00	
Total	$3,500.00	189,500.00	3,500.00

(Continued on next page)

48 DISBURSEMENT SCHEDULE NO. 46 (Continued)

Treaty of March 21, 1866, 14 Stat. 755	Fiscal year		
	1903	1904	1905
Article 3:			
Cash payments to Seminole Treasurer	$3,500.00	$3,500.00	$3,500.00
Total	$3,500.00	$3,500.00	$3,500.00

(Continued on next page)

49 DISBURSEMENT SCHEDULE NO. 46 (Continued)

Treaty of March 21, 1866, 14 Stat. 755	Fiscal year		Total
	1906	1907	
Article 3:			
Support of Seminole Government			$6,373.97
Expense of improving lands			30,000.00
Provisions			40,362.00
Work and stock animals			15,000.00
Agricultural implements and equipment			5,000.00
Cash payments to Seminole Treasurer	$3,500.00	$1,750.00	116,001.15
Education			16,902.80
Purchase, repairs, and removal of sawmill and gristmill			15,000.00
Payment of drafts on Seminole Nation			500.00
Articles 3 and 4:			
Expenses of investigating losses			3,036.19
Cash payments to loyal Seminoles for losses incurred during Civil War			241,591.28
Article 7:			
Expenses of taking census			1,719.68
Cash payments to Seminole Treasurer			761.08
Miscellaneous items:			
Provisions			31,083.79
Expenses of transporting seed wheat			475.20
Carried forward	$3,500.00	$1,750.00	$523,807.14

50 DISBURSEMENT SCHEDULE NO. 49 (Continued)

Act of March 2, 1889, 25 Stat. 1004	Fiscal year		
	1899	1900	1901
Cash payments to Seminole Treasurer	$75,000.00	$75,000.00	$74,933.75
Depredations			66.25
Total	$75,000.00	$75,000.00	$75,000.00

(Continued on next page)

51 DISBURSEMENT SCHEDULE NO. 49 (Continued)

Act of March 2, 1889, 25 Stat. 1004	Fiscal year		
	1902	1903	1904
Cash payments to Seminole Treasurer	$75,000.00	$75,000.00	$75,000.00
Total	$75,000.00	$75,000.00	$75,000.00

(Continued on next page)

52 DISBURSEMENT SCHEDULE NO. 49 (Continued)

Act of March 2, 1889, 25 Stat. 1004	Fiscal year		
	1905	1906	1907
Cash payments to Seminole Treasurer	$74,552.09	$75,000.00	$22,671.12
Depredations	448.00		2,542.00
Total	$75,000.00	$75,000.00	$25,213.12

(Continued on next page)

53 DISBURSEMENT SCHEDULE NO. 52

Disbursements made by the United States for the benefit of the Seminole Nation of Indians from:

"Indian Moneys, Proceeds of Labor (Seminoles)" [1]

Agreement of December 16, 1897, ratified by the act of July 1, 1898, 30 Stat. 567; and the act of April 26, 1906, 34 Stat. 137	Fiscal year		
	1900	1903	1911
Cash payments to Seminole Treasurer	$288.00	$7.71	
Pay of miscellaneous employees			$20.44
Expenses of advertising, appraisal, and sale of unallotted land			11.77
Education			856.67
Total	$288.00	$7.71	$888.88

(Continued on next page)

[1] For amounts credited to this fund, see pages 336 to 339.

54 [Clerk's Certificate to foregoing transcript omitted in printing.]

(Endorsement on cover:) File No. 40,712. Court of Claims. Term No. 172. The United States, petitioner, *vs.* The Seminole Nation. Petition for a writ of certiorari and exhibit thereto. Filed July 8, 1936. Term No. 172 O. T. 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936

Supreme Court of the United States

Order allowing certiorari

Filed October 12, 1936

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. —

THE UNITED STATES

v.

THE SEMINOLE NATION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in this cause on December 2, 1935.

OPINION BELOW

The opinion of the Court of Claims was rendered December 2, 1935, but has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered December 2, 1935. A motion for a new trial was made February 6, 1936, and was denied March 2, 1936. A second motion for a new trial was filed, with leave of the Court of Claims, on May 13, 1936, was orally argued June 1, 1936, and was denied June

8, 1936. The jurisdiction of this Court is invoked under Section 4 of the Act of May 20, 1924, c. 162, 43 Stat. 133, 134, and Section 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939, U. S. C., Title 28, Sec. 288.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether the claims adjudicated by the Court of Claims were presented to it for decision in the time within which the United States had consented to be sued.

2. Whether Section 19 of the Curtis Act changed the purposes for which, and the persons to whom, moneys due under trusts and statutes relating to the Seminoles should be paid.

3. Whether a trustee who makes, at the request of his beneficiaries, payments to their agent, of which they do not deny receiving the benefit, is liable to pay these sums to the beneficiaries a second time.

TREATIES AND STATUTES INVOLVED

In the Appendix, *infra,* pp. 32 to 76, there are set forth, first, the statutes upon which the jurisdiction of the Court of Claims is based; next, the treaties with the Seminole Indians; then, in chronological order, the other statutes involved; and, finally, the relevant opinions of the Comptroller of the Treasury and of Assistant Attorney General Van Devanter.

STATEMENT

The Act of May 20, 1924, c. 162, 43 Stat. 133, as amended by the Act of Feb. 19, 1929, c. 268, 45 Stat. 1229, conferred upon the Court of Claims jurisdiction to adjudicate claims of the Seminole Indians against the United States growing out of treaties, agreements, or statutes of the United States, provided that suit was instituted by June 30, 1930 (Finding I).

On February 24, 1930, the Seminole Nation (hereinafter called the "Seminoles") filed in the Court of Claims a petition alleging that it "was the owner of large trust funds, held in trust by the defendant [the Government] for its use and benefit, and that there existed various treaties and agreements between said plaintiff and defendant whereby said trust funds were to be managed and invested by defendant, and the interest thereon paid over to the National Treasurer of plaintiff" (Petition, paragraph II); that after the Curtis Act, Act of June 28, 1898, c. 517, 30 Stat. 495, the Government impounded the funds, "refused to further pay them over to plaintiff's National Treasurer, and proceeded to disburse them for various purposes" (Petition, paragraph III); and that "from July 1st, 1898, until the present time, defendant, in violation of * * * the rights of plaintiff under its various treaties and agreements with defendant, and without authority of Congress,

has spent large sums of the trust funds" (Petition, paragraph VI). The petition prayed that "defendant be required to file in this cause a statement showing its expenditures of plaintiff's funds *during said period*" and that "plaintiff have judgment against the defendant in such sum or sums as appear to this court to be expended without authority of law" (Petition, paragraph VIII).

On September 19, 1934, the Seminoles filed an amended petition. In addition to repeating the earlier allegations of a wrongful expenditure between July 1, 1898, and the present time, of trust funds created by treaties and agreements, the amended petition presented for adjudication claims for failure to make payments due under trusts created by treaties, agreements, and statutes, both before and after 1898, and claims for failure to make miscellaneous payments due under treaties. These claims are so numerous that it will be convenient to state, first, the claims arising out of the trust funds and, then, the miscellaneous claims.

A. Trust Fund Claims

There were, in all, four trusts held by the Government for the benefit of the Seminole Nation:

> 1. A trust fund of $500,000 (originally two funds, each of $250,000), established by Article VIII of the Treaty of August 7, 1856, 11 Stat. 699, 702, upon which the Government agreed to pay annual interest of $25,000 (Finding III).

2. A trust fund of $70,000, established by Article III of the Treaty of March 21, 1866, 14 Stat. 755, 756–757, upon which the Government agreed to pay annual interest of $2,500 for "the support of schools" and annual interest of $1,000 for the support of the Seminole Government (Finding VIII).

3. A trust fund of $1,500,000, established by Section 12 of the Indian Appropriation Act for the fiscal year 1890, Act of March 2, 1889, c. 412, 25 Stat. 980, 1004, upon which Congress directed that there be paid annual interest of $75,000 to the Seminole tribal treasurer.

4. A trust fund of $500,000, which was originally part of the $1,500,000 just mentioned but which was "set apart as a permanent school fund" by the Seminole Agreement of December 16, 1897, ratified by Act of July 1, 1898, c. 542, 30 Stat. 567, 568 (second full paragraph on 568). $25,000 of the $75,000 mentioned in the preceding paragraph represents the annual interest on this trust fund (Opinion, Item 9).

The Seminoles claim that the Government has in various ways violated its fiduciary duties under each of these trusts. However, with respect to all of these trusts, in addition to the differing claims, one common claim is presented, which it will be convenient to state at once.

The common claim relates to the period from the fiscal year 1899 through the first half of the fiscal year 1907. During this period the Government,

under the four trusts just referred to, was obligated to pay annually interest, $25,000, plus $3,500, plus $75,000, or a total of $879,500 in 8½ years. The lower court found that for this period the Government did pay the Seminole tribal treasurer $864,702.58 (Finding XII; see also Finding IX). The court in effect held that after the passage of Section 19 of the Curtis Act, Act of June 28, 1898, c. 517, 30 Stat. 495, 502, the Government should have made these payments to the members of the Seminole Nation per capita, not to the tribal treasurer. The court thereupon adjudged that the Government was liable to the Seminoles for $864,702.58, the amount theretofore paid to the Seminole tribal treasurer—not $879,500, the amount promised (Opinion, Item 8).

In addition to this common claim, there are different claims with respect to each different trust.

With respect to the $500,000 trust established by the Treaty of 1856, the Seminoles claim that the Government, though it promised to pay $25,000 a year, made underpayments in 1867–1874, 1876, 1879, and 1907–1909. The lower court found that in each of those years there was an underpayment and, after tabulating those underpayments (Finding VI), concluded that the total shortage was $154,551.28 (Opinion, Item 3). The Government contended that against this apparent shortage there should be credited as offsets (a) the amounts by which in the years 1875, 1877, 1880, 1882, and

1883, the Government had overpaid the $25,000 promised; (b) the amounts paid in 1870 and 1874 at the request of the Council of the Seminole Nation; and (c) the amounts shown to have been expended in 1908, 1909, 1910, 1919, and 1921 for "Fulfilling Treaties with Florida Indians or Seminole Indians." The lower court refused to make findings as to, or to allow credits for, these offsets, on the ground that the Government had not formally filed a counterclaim. Instead the court held the Government liable for the full $154,551.28 (Opinion, Item 3).

With respect to the $70,000 trust fund established by the Treaty of 1866, the Government promised to pay $2,500 a year for "the support of schools." The Seminoles claim that in some years the Government made underpayments and in other years payments to the wrong person. Regarding underpayments, the lower court found (Finding IX) for the fiscal years 1867 to 1874, inclusive, that the Government paid $16,902.80 (or an underpayment of $3,097.20) and for the fiscal year 1907, $1,750 (or an underpayment of $750). The Government contended that against these apparent shortages there should be credited as offsets miscellaneous amounts, including particularly those shown by the General Accounting Office Report to have been expended in 1908, 1909, 1910, 1919, and 1921 for "Fulfilling Treaties with Florida Indians or Seminole Indians." The lower court, without

making any findings as to the Government's contention, and without giving any reasons for its omission, held the Government liable for underpayments of $3,097.20 and $750 (Opinion, Item 5). Regarding payments of this $2,500 annuity to the wrong person, the lower court found (Finding IX) that from the fiscal year 1875 to the fiscal year 1907, inclusive, the Government paid annuities directly to the Seminole tribal treasurer. The payments for the latter part of this period, from 1899 to 1907, have already been discussed (see the paragraph beginning at the bottom of page 5, *supra*) and are considered in the lower court's opinion, Item 8. The payments for the period from 1875 to 1898, inclusive, have not heretofore been discussed. The lower court held (Opinion, Item 5), that these payments from 1875 through 1898 should not have been made to the Seminole tribal treasurer but should have been disbursed by the Government itself for the support of schools. The lower court concluded (Opinion, Item 5), that the Government was liable for $57,500 (which apparently represents 23 instead of 24 years' payments at the rate of $2,500 a year).

With respect to the trust fund established by Section 12 of the Indian Appropriation Act of 1890, which originally amounted to $1,500,000, no claim is made other than the common claim already discussed at pages 5–6, *supra*.

With respect to the $500,000 trust fund set apart by the Seminole Agreement of 1897, the Seminoles

claim that the Government made unauthorized diversions of principal. The 1897 Agreement stipulated that the $500,000 "shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five percent interest, or invested so as to produce such amount of interest, which shall be, after extinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of the Seminole people" (Opinion, Item 9). The lower court found (Finding XIII) that the Government disbursed from the principal of this fund (a) for per capita payments, $25,744.50 in 1920 and $6,701.06 in 1921; (b) for equalization of allotments, $490.22 in 1921; and (c) for education, $17,743.43 in 1922, $16,679.86 in 1923, $247.94 in 1924, $6,504.72 in 1925, $12,809.52 in 1926, $17,815.59 in 1927, $19-685.35 in 1928, $1.29 in 1929, and $30,031.82 in 1930. The lower court held that all of these disbursements from principal were illegal, and the Government was liable for the total diversions, amounting to $154,455.30 (Opinion, Item 9).

B. Miscellaneous Claims

1. By Article VIII of the Treaty of August 7, 1856, 11 Stat. 699, 702 (Finding III), the Government promised the Seminoles

> to provide annually for ten years the sum of three thousand dollars for the support of

> schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith shops among them, * * *

During the ten years covered by this article, the fiscal years from 1858 to 1867, inclusive, the Government disbursed in payment of these obligations $10,436.58 (Finding IV). The Government contended that it had disbursed the balance of $61,563.42 for the relief and support of loyal refugee Indians, and that this expenditure, having been authorized by the Resolution of Feb. 22, 1862, No. 13, 12 Stat. 614; Act of July 5, 1862, c. 135, 12 Stat. 512, 528; Section 3 of the Act of March 3, 1863, c. 99, 12 Stat. 774, 793; Section 2 of the Act of June 25, 1864, c. 148, 13 Stat. 161, 180; and Section 5 of the Act of March 3, 1865, c. 127, 13 Stat. 541, 562, fulfilled the obligation under Article VIII of the Treaty of 1856. The lower court made no finding as to whether the $61,563.42 had actually been expended for the benefit of refugee Indians, but merely held that there was no law authorizing the Government to satisfy its treaty obligation in this manner. The Government also contended that the expenditure of the $61,563.42 for the benefit of refugee Indians was ratified by Article VIII of the Treaty of March 21, 1866, 14 Stat. 755, 759. But the lower court denied the contention, and held the Government liable for the whole balance, $61,563.42 (Opinion, Item 1).

2. By Article IX of the Treaty of Aug. 7, 1856, 11 Stat. 699, 703 (Finding III), the Government promised the Seminoles

> to expend for them in improvements, after they shall all remove, the sum of twenty thousand dollars * * *.

The Government, however, disbursed for this purpose only $18,210 (Finding VII). The lower court held the Government liable for the balance of $1,790 (Opinion, Item 4).

3. By Article VI of the Treaty of March 21, 1866, 14 Stat. 755, 758 (Finding VIII) the Government promised the Seminoles

> that the United States shall cause to be constructed, at an expense not exceeding ten thousand ($10,000) dollars, suitable agency buildings, the site whereof shall be selected by the agent of said tribe, under the direction of the superintendent of Indian affairs; in consideration whereof, the Seminole nation hereby relinquish and cede forever to the United States one section of their lands, upon which said agency buildings shall be directed [erected], which land shall revert to said nation when no longer used by the United States, upon said nation paying a fair value for said buildings at the time vacated.

The Government disbursed for this purpose the sum of $931.76 (Finding XI). The lower court held the Government liable for the difference be-

tween that sum and $10,000, or $9,068.24 (Opinion, Item 7).

In addition to the foregoing claims, other claims, for which certiorari is not petitioned, were adjudicated by the lower court, and considered in its opinion under Items 2, 6, 10, 11, 12, and 13.

SPECIFICATIONS OF ERROR TO BE URGED

The court below erred:

1. In failing to hold that its jurisdiction was limited to claims of the Seminole Nation arising from payments made, after July 1, 1898, by the Government, from trust funds created under Seminole treaties or agreements, to persons other than the Seminole tribal treasurer.

2. In holding that Section 19 of the Curtis Act applied to the four trusts created by Article VIII of the Seminole Treaty of 1856, Article III of the Seminole Treaty of 1866, Section 12 of the Indian Appropriation Act for the fiscal year 1890, and the Seminole Agreement of 1897, for the benefit of the Seminoles.

3. In holding that the Government is liable to make to the Seminoles a second payment of the $864,702.58 which the Government had already paid from 1889 to 1907 at their request to the tribal treasurer on account of obligations arising under the said four trusts held for the benefit of the Seminoles.

4. In holding that it was unlawful for the Government, from 1875 to 1898 inclusive, to have paid

directly to the Seminole tribal treasurer the interest due on the $50,000 trust fund for the support of schools created by Article III of the Seminole Treaty of 1866; and that the Government is now liable to make to the Seminoles a second payment per capita of any interest so paid.

5. In holding that the Government was not entitled to set off against its underpayments of amounts due under the trust established by Article VIII of the Seminole Treaty of 1856 the amounts by which, in the years 1875, 1877, 1880, 1882, and 1883, the Government had overpaid the $25,000 annuity promised, the amounts paid in 1870 and 1874 at the request of the Council of the Seminole Nation, and the amounts expended in 1908, 1909, 1910, 1919, and 1921 for "Fulfilling Treaties with Florida Indians or Seminole Indians."

6. In failing to make findings of fact as to the amounts by which, in the years 1875, 1877, 1880, 1882, and 1883, the Government had overpaid the said $25,000 promised annuity, the amounts paid in 1870 and 1874 at the request of the Council of the Seminole Nation, and the amounts expended in 1908, 1909, 1910, 1919, and 1921 for "Fulfilling Treaties with Florida Indians or Seminole Indians."

7. In holding that the Government was not entitled to set off against its underpayments of amounts due under the $70,000 trust established by Article III of the Treaty of 1866 the miscellaneous

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amounts expended in 1908, 1909, 1910, 1919, and 1921 for "Fulfilling Treaties with Florida Indians or Seminole Indians:"

8. In failing to make findings of fact as to the total amount the Government expended in 1908, 1909, 1910, 1919, and 1921 for "Fulfilling Treaties with Florida Indians or Seminole Indians," and the portions thereof attributable respectively to the obligations due under the $70,000 trust established under the Treaty of 1866, and the obligations due under the $500,000 trust fund established by the Treaty of 1856.

9. In holding that Congress had not authorized such payments as were made from the principal of the $500,000 trust fund set apart by the Agreement of 1897.

10. In failing to hold that the Government was not liable for a deficiency in the annual payments of $7,200 due under Article VIII of the Treaty of 1856 inasmuch as Congress had authorized the expenditure of those annual payments, and the executive branch of the Government had spent them, for the relief of loyal refugee Indians instead of the purposes originally contemplated.

11. In failing to hold that the Government was not liable for a deficiency in so many of the said annual payments of $7,200 as were due prior to the fiscal year 1867 inasmuch as the Seminoles, by Article VIII of the Treaty of 1866, released any liabilities that might have existed for those years.

12. In failing specifically to find and to hold that to meet the said annual payment of $7,200 for the fiscal year 1867 the Government expended, in the manner provided for in the Treaty of 1866, $3,000 for the support of schools, $2,000 for agricultural assistance, and $2,197.50 for the support of smiths.

13. In holding that the promise in Article VI of the Treaty of 1866 that "the United States shall cause to be constructed, at an expense *not exceeding* ten thousand ($10,000) dollars, suitable agency buildings", should be construed to require the Government to spend the entire $10,000.

14. In holding that by breaking its agreement to erect agency buildings, the Government became liable for the difference between the full value of the buildings promised and the cost of the buildings actually erected.

REASONS FOR GRANTING THE WRIT

1. Departing from the usual and accepted course of judicial proceedings, the lower court erroneously allowed the Seminoles, after the time for bringing suit had lapsed, to amend their petition to present for adjudication causes of action not included in their original petition.

The statutes by which the United States consented to be sued by the Seminoles on the claims at bar provided that suit must be instituted by June 30, 1930. Act of May 20, 1924, c. 162, 43 Stat. 133, as amended by Act of Feb. 19, 1929, c. 268, 45 Stat.

1229. By that date the only pleading presented to the lower court by the Seminoles was the petition of February 24, 1930. The essential elements of the cause of action then set forth were: (1) that as a result of treaties and agreements (not statutes) the Government held funds in trust for the Seminoles (paragraph II); (2) that, after the Curtis Act of June 28, 1898, the Government had refused payment from these funds (paragraph III); (3) that from July 1, 1898, until February 24, 1930, the Government "in violation of the rights of plaintiff under its various treaties and agreements with defendant, and without authority of Congress, has spent large sums of the trust funds of plaintiff" (paragraph VI); and (4) that the Seminoles seek a judgment for these unlawful expenditures "during said period" from 1898 to 1930 (paragraph VIII).

In short, the petition sought recovery for expenditures, made after July 1, 1898, without the authority of a treaty or agreement, from trust funds established by a treaty or agreement.

There is no resemblance between this original cause of action and the following causes of action or claims set forth in the amended petition filed September 19, 1934, four years after the jurisdiction of the Court of Claims had lapsed, but none the less adjudicated by that court:

(1) The claim that the Government did not completely perform its promise under Article VIII

of the Treaty of August 7, 1856, to pay annually for ten years, $3,000 for schools, $2,000 for agricultural assistance, and $2,200 for blacksmiths. (Opinion, Item 1. See pages 9–10, *supra*.) This is not an obligation connected with a trust fund, and the dereliction, if any, occurred before 1898.

(2) The claim that the Government did not completely perform its promise under Article IX of the Treaty of August 7, 1856, to spend $20,000 for improvements. Opinion, Item 4. See page 11, *supra*. This cause of action is not connected with a trust fund, and antedates 1898.

(3) The claim that the Government did not completely perform its promise under Article VI of the Treaty of March 21, 1866, to spend $10,000 for agency buildings. Opinion, Item 7. See page 11, *supra*. This is another cause of action not connected with a trust, and antedates 1898.

(4) The claim that in 1867–1874, 1876, 1879, and 1907–1909, the Government made underpayments of interest on the $500,000 trust established by the Treaty of 1856. Opinion, Item 3. See pages 6–7, *supra*. A claim of underpayment is not the same as a claim for wrongful expenditure; and, moreover, most of these underpayments are alleged to have occurred prior to 1898.

(5) The claim that from 1867 to 1874, inclusive, and again in 1907, the Government made underpayments of interest on the $70,000 trust established by the Treaty of 1866. Opinion, Item 3. See

pages 7–8, *supra*. This claim of underpayment, likewise, is not similar to a claim for wrongful expenditure; and again most of the underpayments are alleged to have occurred prior to 1898.

(6) The claim that from 1875 to 1898 the Government paid the interest on the $70,000 trust fund established by the Treaty of 1866 to the Seminole tribal treasurer instead of for the support of the Seminole schools. Opinion, Item 5. See page 8, *supra*. This claim is based on diversions prior to July 1, 1898.

(7) The claim that from 1899 through the first half of the fiscal year 1907, the Government, in violation of Section 19 of the Curtis Act, paid to the Seminole tribal treasurer the annual interest on the four trust funds established by the Treaty of 1856, the Treaty of 1866, the Indian Appropriation Act of 1890, and the Seminole Agreement of 1897. Opinion, Item 8. See pages 5–6, *supra*. The part of this claim which relates to the $1,500,000 trust fund created by the Indian Appropriation Act of 1890 clearly is different from the cause of action set forth in the original petition of the Seminoles, for the $1,500,000 trust fund exists solely by virtue of statute, not as a result of "treaties and agreements" (Petition, paragraph II). But there is a more basic reason why this and every other part of this claim (and the preceding claim as well) cannot be regarded as having been included in the original cause of action embodied in the petition of February 24, 1930. The original petition

clearly stated, both in the second and third paragraphs, that under all the trusts the duty of the Government was to pay the interest to the National Treasurer of the plaintiff. Complaint was *then* made that the Government committed a breach of trust because it did *not* pay the sums to the tribal treasurer but disbursed them for other purposes. Surely the plaintiff states a different case in *now* alleging that the Government's breach is that it *did* pay the sums to the tribal treasurer when it should have disbursed them for other purposes. Further evidence of this *volte face,* and of the introduction of a new cause of action, is to be found in other language of the pleadings: whereas once exclusive reliance was placed on "the rights of plaintiff under its various treaties and agreements". (Petition, paragraph VI) which had not been impaired by any "subsequent act" of Congress (Petition, paragraph V); now exclusive reliance is sought to be placed on "the violation of said Section 19 of said Act of June 28th, 1898" (Amended Petition, paragraph VIII).

The foregoing analysis makes it clear that many of the claims decided by the lower court were in no sense presented to it in the original petition. In allowing them to be incorporated by an amendment made after June 30, 1930, the lower court did not merely violate the ordinary canon that an amendment will not be permitted to introduce a new cause of action after the statute of limitations has run

N. & G. Taylor Co., Inc. v. *Anderson,* 275 U. S. 431, 438–439; *Baltimore & Ohio S. W. R. Co.* v. *Carroll,* 280 U. S. 491, 494; *United States* v. *Henry Prentiss & Co.,* 288 U. S. 73, 84; see *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, 68–69), it also entertained a suit against the United States on terms to which the Government never consented (*Finn* v. *United States,* 123 U. S. 227). This error went to the jurisdiction of the Court of Claims and can be raised at any stage of the proceedings. *Matson Navigation Co.* v. *United States,* 284 U. S. 352, 359. Cf. *United States* v. *Martinez,* 195 U. S. 469.

2. In holding that Section 19 of the Curtis Act changed the purposes for which, and the persons to whom, moneys due under trusts established under treaties and statutes relating to the Seminoles should be paid (Opinion, Item 8), the lower court has erroneously decided an important question of Federal law which has not been hitherto presented to any court, but which should be settled by this Court.

The Government contends, and the administrative construction prevailing since 1898 has been, that Section 19 of the Curtis Act, Act of June 28, 1898, c. 517, 30 Stat. 495, 502, does not apply to interest payments under any of the four trusts. The section reads as follows:

> That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof *for*

> *disbursement,* but payments of all sums to *members of said tribes* shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation. [Italics added.]

This section relates exclusively to the Government's method of paying amounts due to individual Indians. Prior to the Curtis Act the Government had adopted the practice of paying to the tribal treasurer sums due to the various members of the tribe with directions to disburse the same (Opinion, Item 8). The Curtis Act altered this particular practice and required that payments "for disbursement" "to members of said tribes" should be made not "to any of the tribal governments or to any officer thereof", but to "an officer appointed by" the Secretary of the Interior. The legislative history as well as the language of the section proves that Congress intended to embrace merely payments for disbursement, not miscellaneous direct grants or payments to the Seminole Nation for "expenses in transacting their business" as was originally suggested by the author of the bill (Cong. Rec., 55th Cong., 2d Sess., p. 3869, set forth in the Appendix, p. 76).

Since it is limited to payments for disbursement, the section obviously does not govern payments

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under the second trust or the fourth trust. The second trust, amounting to $70,000, established by Article III of the Treaty of March 21, 1866, provided that $2,500 interest should be "paid annually and appropriated to the support of schools", without specifying to whom payment should be made (Finding VIII). The fourth trust, amounting to $500,000, set apart by the Seminole Agreement of 1897 from the earlier trust funds belonging to the Seminoles, provided that $25,000 interest should be "applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools" (Opinion, Item 9. And see particularly the sixth and second full paragraphs at 30 Stat. 568). In each of these trusts the fiduciary duty of the Government was not to pay money to members of the tribe per capita or otherwise, but to apply interest for a specific educational purpose. In turning the interest over to the tribal treasurer, the Government intended it not "for disbursement", nor "to members of said tribes", but for education.

Moreover, the fourth trust is for another reason not subject to Section 19 of the Curtis Act. The Curtis Act was enacted on June 28, 1898. The fourth trust was created three days thereafter, and specific provision was made "reserving said sum of $500,000" from payment "per capita to the members of said tribe." (See sixth full paragraph, 30 Stat. 568.) This later enactment is the govern-

ing statute, not only under general principles of statutory construction, but because the later enactment specifies that "all laws and parts of laws inconsistent therewith are hereby repealed" (30 Stat. 569).

Nor does Section 19 of the Curtis Act apply to either of the other trusts. The third trust, established by Section 12 of the Indian Appropriation Act of 1890 as a fund of $1,500,000, but reduced to $1,000,000 by the Seminole Agreement of 1897 (30 Stat. 567), provided that the interest should "be paid semi-annually to the treasurer of said [Seminole] nation" (25 Stat. 980, 1004). In direct contrast to the fund of $412,942.20, created in the same sentence of the Indian Appropriation Act of 1890, which was "to be paid to such person or persons as shall be duly authorized by the laws of said [Seminole] nation to receive the same", the trust of $1,500,000 is to be paid not to the individual members of the Seminole tribes but "to the treasurer of said nation." Payments to the tribal treasurer are made to him not as Federal agent for disbursement to members of the tribe, but as a tribal officer for expenditure according to the directions of the Council of the Seminole Nation, which itself is the cestui que trust. And exactly the same principle seems to govern the payments under the first trust. This first trust, amounting to $500,000, established by Article VIII of the Treaty of 1856, originally provided that the interest should be

"paid over to them [the Seminoles] *per capita* as an annuity" (Finding III), but by the Act of April 15, 1874, c. 97, 18 Stat. 29, and subsequent administrative and tribal action, it was determined "to pay such annuities or any part thereof into the treasury of the Seminole nation to be used as the council of the same shall provide, instead of paying the same per capita according to the terms of said treaty." (See Opinion, Item 5.)

Furthermore, it may be suggested that Section 19 of the Curtis Act cannot properly be applied to any trust for the benefit of the Seminoles. The Curtis Act, while naming certain Indian tribes, nowhere makes any reference to the Seminoles as such. Directly after the Curtis Act was passed, Congress made special provision for Seminole funds, and specifically stipulated how and when moneys belonging to the Seminoles should be distributed per capita (30 Stat. 568, paragraph 6). Two Comptrollers of the Treasury, those who represented the Seminoles in 1898, and successive Secretaries of the Interior, have all regarded the specific provision as controlling the Seminole funds, and have thought that Section 19 was an inconsistent law which had been repealed by the concluding clause of the Act ratifying the Seminole Agreement of 1897 (30 Stat. 567, 569). Opinion of L. P. Mitchell, Assistant Comptroller, August 23, 1898; Opinion of R. J. Tracewell, Comptroller, October 19, 1906, Appendix, pp. 49–72, *infra*. (But see the subsequently withdrawn opinion of Asst. Atty.

Gen. Van Devanter, Appendix, pp. 72–76, *infra,* holding that Section 19 of the Curtis Act applies to payments under Seminole treaties. This opinion does not decide whether the rule also applies to payments to the Seminoles which are not intended "for disbursement.") Where the statutes are so ambiguous, and the possible overlapping so evident, we submit that great weight should be given to an administrative construction, now nearly forty years old, which was originally given by the Comptroller of the Treasury, an official specifically charged with the duty of deciding the question (Section 8 of the Dockery Act, Act of July 31, 1894, c. 174, 28 Stat. 162, 208) whose opinion was first invoked by the Secretary of the Interior at the request of the very people who now complain of it (see Appendix, p. 59, second full paragraph), and has since been consistently followed in action annually reported to Congress. (See Reports of the Secretary of the Interior, 1899 through 1907.)

3. In conflict with the weight of authority, the lower court held that where a trustee, at the request of the beneficiaries, makes to their agent payments of which they do not deny receiving the benefit, the trustee is liable to pay these sums to the beneficiaries *a second time.*

In two different situations the lower court applied this erroneous holding:

(a) After determining that the Curtis Act applied to the Seminole trusts, the lower court, as requested by paragraph VIII of the Seminoles'

Amended Petition, held (Finding XII; Opinion, Item 8) that the Government was liable to make to the Seminoles a second payment of the $864,702.58 which the Government had admittedly already paid at their request (See Opinion of Assistant Comptroller Mitchell, particularly second full paragraph, page 59, *infra*) to the tribal treasurer, an appropriate officer of the tribal government recognized by the United States Government. (See 30 Stat. 567.) (It is clear from the Amended Petition, from the court's opinion, and from the amount of the judgment, $864,702.58, not $879,500, that this decision is based on an alleged unauthorized diversion of trust funds, not on an alleged failure to pay interest promised on the trusts.)

(b) The lower court also held that the Government was liable to make to the Seminoles a second payment of the $57,500 which, from 1875 through 1898, the Government had admittedly paid to the Seminole tribal treasurer "for the support of schools" from the interest on $50,000 of the $70,000 trust established by the Treaty of 1866. See page 8, *supra*.

The result reached by the lower court ignores the axiomatic principle that the beneficiaries of a trust cannot hold the trustee liable for actions with respect to the trust property which they request him to take or to which they consent. *Duncan* v. *Jaudon,* 15 Wall. 165, 171–172; *Pope* v. *Farnsworth,* 146 Mass. 339, 344 (per Holmes, J.); *Lannin*

v. *Buckley,* 256 Mass. 78, 82; *Matter of Niles,* 113 N. Y. 547, 559; Perry on *Trusts and Trustees* (7th ed.), § 849; American Law Institute, *Restatement of the Law of Trusts,* § 216. This general rule is particularly applicable in the instant case, for even if the payment to the tribal treasurer was technically improper, the Seminoles do not suggest that the money did not reach them, or that they were damaged, or that the judgment of the lower court will not enrich them by a double payment.

4. In holding that Congress had not authorized the Government to make expenditures from the principal of the $500,000 trust fund which was set apart by the Seminole Agreement of 1897 (Opinion, Item 9), the lower court erroneously decided an important question of Federal law which has not been hitherto presented to any court, but which should be settled by this Court.

By the Seminole Agreement of 1897, ratified by Act of July 1, 1898, c. 542, 30 Stat. 567, 568, $500,000 was "set apart as a permanent school fund." From the principal of this fund the Government disbursed for per capita payments $25,744.50 in 1920, and $6,701.06 in 1921 (Finding XIII). The lower court held that this disbursement from principal was not authorized by Congress. The Government submits that this holding is obviously untenable, inasmuch as Congress, in the Act of May 25, 1918, c. 86, 40 Stat. 561, 580, and pursuant to its constitutional power to modify treaties with the

Indians (*Stephens* v. *Cherokee Nation,* 174 U. S. 445) had specifically provided

> That the Secretary of the Interior be, and he is hereby, authorized to pay to the enrolled members of the Seminole Tribe * * * out of the Seminole school fund * * * not to exceed $100 per capita * * *

This specific provision was not limited in its operation to one year, but was a continuing grant of authority as is plain not only from the words of this Act itself but also from the later Act of June 30, 1919, c. 4, 41 Stat. 3, 23, and the Act of Feb. 14, 1920, c. 75, 41 Stat. 408, 427–428 (the appropriation Acts for the two fiscal years when the sums of $25,744.50 and $6,701.06 were disbursed).

From the principal of this fund the Government also made disbursements for education in each of the years from 1922 to 1930 (Finding XIII). The lower court also held that this disbursement had not been authorized. But the appropriation acts for this period, Act of Mar. 3, 1921, c. 119, 41 Stat. 1225, 1242; Act of May 24, 1922, c. 199, 42 Stat. 552, 575; Act of Jan. 24, 1923, c. 42, 42 Stat. 1174, 1196; Act of June 5, 1924, c. 264, 43 Stat. 390, 398; Act of Mar. 3, 1925, c. 462, 43 Stat. 1141, 1148; Act of May 10, 1926, c. 277, 44 Stat. 453, 460; Act of Jan. 12, 1927, c. 27, 44 Stat. 934, 948; Act of Mar. 7, 1928, c. 137, 45 Stat. 200, 216; Act of Mar. 4, 1929, c. 705, 45 Stat. 1562, 1577 (all of which are printed in the Appendix) make it clear that the

court was in error and that Congress had each year provided substantially as follows:

> The Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes from the tribal funds of those nations.

This authorization is not limited to an expenditure of interest from the fund which was originally $500,000, but which as a result of the per capita payments had been reduced to less than $275,000. The authorization embraces any expenditure whether from principal or interest if it is necessary "to continue * * * the tribal and other schools." And, indeed, expenditures from principal must have been anticipated since the interest on the reduced fund was inadequate to educate the Seminoles. Moreover, the use of the principal for educational purposes had gone on for many years and had been regularly reported to Congress.

5. The lower court's decision is incorrect in other respects, as to which error has already been specified, pages 12–15, *supra,* but as to which it does not seem necessary to make a full argument now. At this time it will be sufficient to note two rulings on questions of general law which are obviously untenable and in conflict with the weight of authority:

(a) The lower court held that in the absence of a formal counterclaim, the Government was not entitled to set its overpayments in some years of income on the first $500,000 trust off against its underpayments in other years of income on the same trust. See pages 6–7, *supra.* This holding conflicts with the hornbook rule that in a suit against a trustee for an accounting, he is entitled to credit against or withhold from any amount owing to the beneficiary any amount already paid the beneficiary when it was not due. *Livesey* v. *Livesey,* 3 Russ. 287, 295–296; *Dibbs* v. *Goren,* 11 Beav. 483, 484; *Hammond* v. *Hammond,* 169 Mass. 82, 85; *Bailey* v. *Smith,* 214 Mass. 114, 120; *King's Estate,* 147 Pa. 410; *Equitable Trust Co.* v. *Miller,* 185 N. Y. Supp. 661, aff'd, 197 App. Div. 391, aff'd, 233 N. Y. 650; Perry, *Trusts and Trustees,* 7th ed. § 915, 930; Bogert, *Trusts and Trustees,* pp. 2364–2365. This hornbook rule is not affected by Section 3 of the Act of May 20, 1924, c. 162, 43 Stat. 133, 134. That section obviously refers to offsets arising from transactions in no way related to the transaction on which the principal claim is founded, and does not modify the rule that "in a bill for an accounting, both parties are actors, and a defendant may have a decree in his favor without the aid of a cross-bill." *Braman* v. *Foss,* 204 Mass. 404, 411.

(b) In Article VI of the Treaty of 1866 the Government agreed to spend "*not exceeding* ten

thousand ($10,000) dollars" for agency buildings which the Seminoles were not to own until the United States no longer wanted the land on which they stood, and until the Seminoles paid a fair value for the buildings (Finding IX). The Government spent $931.76 for agency buildings (Finding XI). The lower court held the Government liable for the entire balance, $9,068.24 (Opinion, Item 7). Among other reasons, this holding is erroneous because it conflicts with the established rule that where A agrees to erect on his own land a building for B's purposes, and A fails to perform, the measure of damages is the fair rental value of the promised building, and not the entire value of the promised building. *Hexter* v. *Knox,* 63 N. Y. 561; *Pewaukee Milling Co.* v. *Howitt,* 86 Wis. 270, 277; *Prescott* v. *Otterstatter,* 79 Pa. 462, 467; Tiffany, *Landlord and Tenant,* § 87 (e) (10), pp. 605–606.

CONCLUSION

Wherefore it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

JUNE 1936.

APPENDIX

ACT OF MAY 20, 1924, C. 162, 43 STAT. 133, 134

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian Affairs, which said Seminole Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

SEC. 2. Any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of approval of this Act, and such suit shall make the Seminole Nation party plaintiff and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claim or claims under contract with the Seminoles approved by the Commissioner of Indian Affairs and the Secretary of the Interior; and said contract shall be executed in their behalf by a com-

mittee chosen by them under the direction and approval of the Commissioner of Indian Affairs and the Secretary of the Interior. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said Indian nation to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys of said Indian nation.

SEC. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation, but any payment which may have been made by the United States upon any claim against the United States shall not operate as an estoppel, but may be pleaded as an offset in such suit.

SEC. 4. That from the decision of the Court of Claims in any suit prosecuted under the authority of this Act, an appeal may be taken by either party as in other cases to the Supreme Court of the United States.

ACT OF FEB. 19, 1929, C. 268, 45 STAT. 1229

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the time within which suits may be instituted under the Act of Congress approved March 19, 1924, entitled "An Act conferring jurisdiction upon the Court of Claims to hear, examine, adjudicate, and enter judgment in any claims which the Cherokee Indians may have against the United States, and for other purposes"; the Act of Congress approved May 20,

1924, entitled "An Act conferring jurisdiction upon the Court of Claims to hear, examine, adjudicate, and enter judgment in any claims which the Seminole Indians may have against the United States, and for other purposes"; the Act of Congress approved May 24, 1924, entitled "An Act conferring jurisdiction upon the Court of Claims to hear, examine, adjudicate, and enter judgment in any claims which the Creek Indians may have against the United States, and for other purposes"; and the Act of Congress approved June 7, 1924, entitled "An Act conferring jurisdiction upon the Court of Claims to hear, examine, adjucate, and enter judgment in any claims which the Choctaw and Chickasaw Indians may have against the United States, and for other purposes", shall be extended to June 30, 1930, to permit each Indian nation or tribe mentioned in said Acts of Congress to institute suits as provided in said Acts and the joint resolution approved May 19, 1926 (Public Resolution Numbered 27, Sixty-ninth Congress).

TREATY OF AUGUST 7, 1856, BETWEEN THE UNITED STATES AND THE CREEK AND SEMINOLE TRIBES OF INDIANS, 11 STAT. 699, 702

ARTICLE VIII. The Seminoles hereby release and discharge the United States from all claims and demands which their delegation have set up against them, and obligate themselves to remove to and settle in the new country herein provided for them as soon as practicable. In consideration of such release, discharge, and obligation, and as the Indians must abandon their present improvements, and incur considerable expense in reestablishing themselves, and as the government desires

to secure their assistance in inducing their brethren yet in Florida to emigrate and settle with them west of the Mississippi River, and is willing to offer liberal inducements to the latter peaceably so to do, the United States do therefore agree and stipulate as follows, viz: To pay to the Seminoles now west, the sum of sixty[1] thousand dollars, which shall be in lieu of their present improvements, and in full for the expenses of their removal and establishing themselves in their new country; to provide annually for ten years the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith shops among them, said sums to be applied to these objects in such manner as the President shall direct. Also to invest for them the sum of two hundred and fifty thousand dollars, at five percent per annum, the interest to be regularly paid over to them *per capita* as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the two sums so invested, shall constitute a fund belonging to the united tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them *per capita* as an annuity; but no portion of the principal thus invested, or the interest thereon annually due and payable, shall ever be taken to pay claims or demands against said Indians, except such as may hereafter arise under the intercourse laws.

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[1] See Amendent, substituting ninety for sixty, *post*, p. 706.

ARTICLE IX. The United States agree * * * to expend for them in improvements, after they shall all remove, the sum of twenty thousand dollars * * *.

TREATY OF MARCH 21, 1866, BETWEEN THE UNITED STATES AND THE SEMINOLE NATION, 14 STAT. 755, 756

ARTICLE III. In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Seminoles cede and convey to the United States their entire domain, being the tract of land ceded to the Seminole Indians by the Creek nation under the provisions of article first (1st), treaty of the United States with the Creeks and Seminoles, made and concluded at Washington, D. C., August 7, 1856. In consideration of said grant and cession of their lands, estimated at two million one hundred and sixty-nine thousand and eighty (2,169,080) acres, the United States agree to pay said Seminole nation the sum of three hundred and twenty-five thousand three hundred and sixty-two ($325,362) dollars, said purchase being at the rate of fifteen cents per acre. The United States having obtained by grant of the Creek nation the westerly half of their lands, hereby grant to the Seminole nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole nation are bounded and described as follows, to wit: Beginning on the Canadian river where the line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866, following said line due north to where said line crosses the north fork of

the Canadian river; thence up said north fork of the Canadian river a distance sufficient to make two hundred thousand acres by running due south to the Canadian river; thence down said Canadian river to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of one hundred thousand dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written. The balance due the Seminole nation after making said deduction, amounting to one hundred thousand dollars, the United States agree to pay in the following manner, to wit: Thirty thousand dollars shall be paid to enable the Seminoles to occupy, restore, and improve their farms, and to make their nation independent and self-sustaining, and shall be distributed for that purpose under the direction of the Secretary of the Interior; twenty thousand dollars shall be paid in like manner for the purpose of purchasing agricultural implements, seeds, cows, and other stock; fifteen thousand dollars shall be paid for the erection of a mill suitable to accommodate said nation of Indians; seventy thousand dollars to remain in the United States treasury, upon which the United States shall pay an annual interest of five percent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools; the remainder of the seventy thousand dollars, being twenty thousand dollars, shall remain a permanent fund, the interest of which shall

be paid annually for the support of the Seminole government; forty thousand three hundred and sixty-two dollars shall be appropriated and expended for subsisting said Indians, discriminating in favor of the destitute; all of which amounts, excepting the seventy thousand dollars, to remain in the treasury as a permanent fund, shall be paid upon the ratification of said treaty, and disbursed in such manner as the Secretary of the Interior may direct. The balance, fifty thousand dollars, or so much thereof as may be necessary to pay the losses ascertained and awarded as hereinafter provided, shall be paid when said awards shall have been duly made and approved by the Secretary of the Interior. And in case said fifty thousand dollars shall be insufficient to pay all said awards, it shall be distributed pro rata to those whose claims are so allowed; and until said awards shall be thus paid, the United States agree to pay to said Indians, in such manner and for such purposes as the Secretary of the Interior may direct, interest at the rate of five per cent per annum from the date of the ratification of this treaty.

ARTICLE VI. Inasmuch as there are no agency buildings upon the new Seminole reservation, it is therefore further agreed that the United States shall cause to be constructed, at an expense not exceeding ten thousand ($10,000) dollars, suitable agency buildings, the site whereof shall be selected by the agent of said tribe, under the direction of the Superintendent of Indian affairs; in consideration whereof, the Seminole Nation hereby relinquish and cede forever to the United States one section of their lands, upon which said agency buildings shall be *directed* [erected], which land

shall revert to said nation when no longer used by the United States, upon said nation paying a fair value for said buildings at the time vacated.

ARTICLE VIII. The stipulations of this treaty are to be a full settlement of all claims of said Seminole nation for damages and losses of every kind growing out of the late rebellion, and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose, consequent upon the late war with the so-called confederate states. And the Seminoles hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Seminole nation by the United States. And the United States agree that no annuities shall be diverted from the objects for which they were originally devoted by treaty stipulations with the Seminoles, to the use of refugee and destitute Indians, other than the Seminoles or members of the Seminole nation, after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six.

ACT OF APRIL 15, 1874, C. 97, 18 STAT. 29

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioner of Indian Affairs, with the sanction of the Secretary of the Interior and the President of the United States, in distributing and paying annuities, interest, or other moneys now due or hereafter to become due to the Seminole tribe of Indians under the provisions of the eighth article of the treaty between the Creek and Seminole Indians and the United States, concluded August seventh, eighteen hun-

dred and fifty-six, shall be authorized to expend the same for such objects as will best promote the comfort, civilization, and improvement of the Seminole Indians, or in his discretion, with the sanction of the Secretary and the President aforesaid, shall be authorized to pay such annuities or any part thereof into the treasury of the Seminole nation to be used as the council of the same shall provide, instead of paying the same per capita according to the terms of said treaty: *Provided,* That said agreement shall provide that the sum of five thousand dollars shall be annually appropriated out of said annuity to the school fund of said tribe: *And provided further,* That the consent of said tribe to such expenditures and payment shall be first obtained.

ACT OF MARCH 2, 1889, C. 412, 25 STAT. 980, 1004

SEC. 12. That the sum of one million nine hundred and twelve thousand nine hundred and forty-two dollars and two cents be, and the same hereby is, appropriated, out of any money in the Treasury not otherwise appropriated, to pay in full the Seminole Nation of Indians for all the right, title, interest, and claim which said nation of Indians may have in and to certain lands ceded by article three of the treaty between the United States and said nation of Indians, which was concluded June fourteenth, eighteen hundred and sixty-six, and proclaimed August sixteenth, eighteen hundred and sixty-six, and which land was then estimated to contain two million one hundred and sixty-nine thousand and eighty acres, but which is now, after survey, ascertained to contain two million thirty-seven thousand four hundred and fourteen and

sixty-two hundredths acres, said sum of money to be paid as follows: One million five hundred thousand dollars to remain in the Treasury of the United States to the credit of said nation of Indians and to bear interest at the rate of five per centum per annum from July first, eighteen hundred and eighty-nine, said interest to be paid semi-annually to the treasurer of said nation, and the sum of four hundred and twelve thousand nine hundred and forty-two dollars and twenty cents, to be paid to such person or persons as shall be duly authorized by the laws of said nation to receive the same, at such times and in such sums as shall be directed and required by the legislative authority of said nation, to be immediately available; this appropriation to become operative upon the execution by the duly appointed delegates of said nation, specially empowered so to do, of a release and conveyance to the United States of all the right, title, interest, and claim of said nation of Indians in and to said lands, in manner and form satisfactory to the President of the United States, and said release and conveyance, when fully executed and delivered, shall operate to extinguish all claims of every kind and character of said Seminole Nation of Indians in and to the tract of country to which said release and conveyance shall apply, but such release, conveyance, and extinguishment shall not inure to the benefit of or cause to vest in any railroad company any right, title, or interest whatever in or to any of said lands, and all laws and parts of laws so far as they conflict with the foregoing, are hereby repealed, and all grants or pretended grants of said lands or any interest of right therein

now existing in or on behalf of any railroad company, except rights of way and depot grounds, are hereby declared to be forever forfeited for breach of condition.

ACT OF JUNE 28, 1898, C. 517, 30 STAT. 495, 502

SEC. 19. That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.

* * * * *

AN ACT TO RATIFY THE AGREEMENT OF DECEMBER 16, 1897, BETWEEN THE DAWES COMMISSION AND THE SEMINOLE NATION, ACT OF JULY 1, 1898, C. 542, 30 STAT. 567, 568, 569

* * * * *

[Second full paragraph on page 568.]

Five hundred thousand dollars ($500,000) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five per cent interest, or invested so as to produce such amount of interest, which shall be, after extinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of the Seminole people; and there shall be selected and excepted from allotment

three hundred and twenty acres of land for each of said academies and eighty acres each for eight district schools in the Seminole country.

* * * * *

[Sixth full paragraph on page 568.]

All moneys belonging to the Seminoles remaining after equalizing the value of allotments as herein provided and reserving said sum of five hundred thousand dollars for school fund shall be paid per capita to the members of said tribe in three equal installments, the first to be made as soon as convenient after allotment and extinguishment of tribal government, and the others at one and two years, respectively. Such payments shall be made by a person appointed by the Secretary of the Interior, who shall prescribe the amount of and approve the bond to be given by such person; and strict account shall be given to the Secretary of the Interior for such disbursements.

* * * * *

[Last paragraph on page 569.]

* * * That the same be, and is hereby, ratified and confirmed, and all laws and parts of laws inconsistent therewith are hereby repealed.

INDIAN APPROPRIATION ACT FOR THE FISCAL YEAR 1919, ACT OF MAY 25, 1918, C. 86, 40 STAT. 561, 580

That the Secretary of the Interior be, and he is hereby, authorized to pay to the enrolled members of the Seminole Tribe of Indians of Oklahoma entitled under existing law to share in the funds of said tribe, or to their lawful heirs, out of the Seminole school fund, or any moneys belonging to said tribe in the United States Treasury or deposited in any bank or held by an official under the juris-

diction of the Secretary of the Interior, not to exceed $100 per capita: *Provided,* That said payment shall be made under such rules and regulations as the Secretary of the Interior may prescribe: * * *.

INDIAN APPROPRIATION ACT FOR THE FISCAL YEAR 1920, ACT OF JUNE 30, 1919, C. 4, 41 STAT. 3, 23

* * * That during the fiscal year ending June 30, 1920, no moneys shall be expended from tribal funds belonging to the Five Civilized Tribes, without specific appropriation by Congress, except as follows: Equalization of allotments, per capita and other payments authorized by law to individual members of the respective tribes, tribal and other Indian schools for the current fiscal year under existing law, salaries and contingent expenses of governors, chiefs, assistant chiefs, secretaries, interpreters, and mining trustees of the tribes for the current fiscal year at salaries at the rate heretofore paid, and one attorney each for the Choctaw, Chickasaw, and Creek Tribes employed under contract approved by the President, under existing law, for the current fiscal year: * * *

INDIAN APPROPRIATION ACT FOR THE FISCAL YEAR 1921, ACT OF FEB. 14, 1920, C. 75, 41 STAT. 408, 427–428

* * * That hereafter no money shall be expended from tribal funds belonging to the Five Civilized Tribes without specific appropriation by Congress, except as follows: Equalization of allotments, per capita and other payments authorized by law to individual members of the respective tribes, tribal and other Indian schools for the current fiscal year under existing law, salaries and

contingent expenses of governors, chiefs, assistant chiefs, secretaries, interpreters, and mining trustees of the tribes for the current fiscal year at salaries at the rate heretofore paid, and one attorney each for the Choctaw, Chickasaw, and Creek Tribes employed under contract approved by the President, under existing law, for the current fiscal year: * * *

INDIAN APPROPRIATION ACT FOR THE FISCAL YEAR 1922 ACT OF MARCH 3, 1921, C. 119, 41 STAT. 1225, 1243

* * * That the Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes from the tribal funds of those nations, within his discretion and under such rules and regulations as he may prescribe: *And provided further*, That the Secretary of the Interior is hereby empowered, during the fiscal year ending June 30, 1922, to expend funds of the Choctaw, Chickasaw, Creek, and Seminole Nations available for school purposes under existing law for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said tribes. For repair of barn building at Mekusukey Academy, Seminole Nation, Oklahoma, $1,000, payable out of the funds of the Seminole Tribe. * * *

DEPARTMENT OF THE INTERIOR APPROPRIATION ACT FOR THE FISCAL YEAR 1923, ACT OF MAY 24, 1922, C. 199, 42 STAT. 552, 575

* * * That the Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes

from the tribal funds of those nations, within his discretion and under such rules and regulations as he may prescribe: * * * That the Secretary of the Interior is hereby empowered, during the fiscal year ending June 30, 1923, to expend funds of the Choctaw, Chickasaw, Creek, and Seminole Nations available for school purposes under existing law for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said tribes.* * *

DEPARTMENT OF THE INTERIOR APPROPRIATION ACT FOR THE FISCAL YEAR 1924, ACT OF JANUARY 24, 1923, C. 42, 42 STAT. 1174, 1196–1197

* * * That the Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes from the tribal funds of those nations, within his discretion and under such rules and regulations as he may prescribe: * * * That the Secretary of the Interior is hereby empowered, during the fiscal year ending June 30, 1924, to expend funds of the Choctaw, Chickasaw, Creek, and Seminole Nations available for school purposes under existing law for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said tribes. * * *

DEPARTMENT OF THE INTERIOR APPROPRIATION ACT FOR THE FISCAL YEAR 1925, ACT OF JUNE 5, 1924, C. 264, 43 STAT. 390, 398

* * * That the Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes

from the tribal funds of those nations, within his discretion and under such rules and regulations as he may prescribe: * * * That the Secretary of the Interior is hereby empowered, during the fiscal year ending June 30, 1925, to expend funds of the Choctaw, Chickasaw, Creek, and Seminole Nations available for school purposes under existing law for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said tribes * * *

DEPARTMENT OF THE INTERIOR APPROPRIATION ACT FOR THE FISCAL YEAR 1926, ACT OF MARCH 3, 1925, C. 462, 43 STAT. 1141, 1148–1149

* * * That the Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes from the tribal funds of those nations, within his discretion and under such rules and regulations as he may prescribe: * * * That the Secretary of the Interior is hereby empowered, during the fiscal year ending June 30, 1926, to expend funds of the Choctaw, Chickasaw, Creek, and Seminole Nations available for school purposes under existing law for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said tribes. * * *

DEPARTMENT OF THE INTERIOR APPROPRIATION ACT FOR THE FISCAL YEAR 1927, ACT OF MAY 10, 1926, C. 277, 44 STAT. 453, 460

* * * That the Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the

Choctaw, Chickasaw, Creek, and Seminole Tribes from the tribal funds of those nations, within his discretion and under such rules and regulations as he may prescribe: * * * That the Secretary of the Interior is hereby empowered during the fiscal year ending June 30, 1927, to expend funds of the Choctaw, Chickasaw, Creek, and Seminole Nations available for school purposes under existing law for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said tribes. * * *

DEPARTMENT OF THE INTERIOR APPROPRIATION ACT FOR THE FISCAL YEAR 1928, ACT OF JAN. 12, 1927, C. 27, 44 STATS. 934, 948

The Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes from the tribal funds of those nations, within his discretion and under such rules and regulations as he may prescribe and to expend such funds available for school purposes under existing law for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said tribes.

DEPARTMENT OF THE INTERIOR APPROPRIATION ACT FOR THE FISCAL YEAR 1929, ACT OF MARCH 7, 1928, C. 137, 45 STAT. 200, 216

The Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chick-

asaw, Creek, and Seminole Tribes from the tribal funds of those nations, within his discretion and under such rules and regulations as he may prescribe and to expend such funds available for school purposes under existing law for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said tribes: *Provided,* That there may be expended from the tribal funds of the Seminole Nation the sum of $33,000, and from the tribal funds of the Choctaw Nation the sum of $135,000, for educational purposes: * * *

DEPARTMENT OF THE INTERIOR APPROPRIATION ACT FOR THE FISCAL YEAR 1930, ACT OF MARCH 4, 1929, C. 705, 45 STAT. 1562, 1577

For the support of schools and for tuition among the Five Civilized Tribes, there may be expended from tribal funds of such nations $250,000 as follows: Seminole Nation, $33,000; * * *

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE TREASURY,
Washington, D. C., August 23, 1898.

The honorable the SECRETARY OF THE INTERIOR.
Aug. 16, 1898.

SIR: I have received your letter, without date, as follows:

> The Indian appropriation act approved July 1, 1898 (Public, No. 175), makes the following appropriations for the Seminole tribe or nation of Indians:
>
> "For five per centum interest on two hundred and fifty thousand dollars, to be paid as annuity, per *eighth* article of treaty

of August seventh, eighteen hundred and *fifty-six,* twelve thousand five hundred dollars;

"For five per centum interest on two hundred and fifty thousand dollars, to be paid as annuity (they having joined their brethren West) per *eighth* article of treaty of August seventh, eighteen hundred and *fifty-six,* twelve thousand five hundred dollars;

"For interest on fifty thousand dollars, at the rate of five per centum per annum, to be paid annually for the support of schools, as per *third* article of treaty of March twenty-first, eighteen hundred and *sixty-six,* two thousand five hundred dollars;

"For interest on twenty thousand dollars, at the rate of five per centum per annum, to be paid annually for the support of the Seminole government, as per *same article, same treaty,* one thousand dollars; in all, twenty-eight thousand five hundred dollars."

The treaty of August 7, 1856, with the Creeks and Seminoles (11 Stat., 699), secured to the said tribes respectively the right of self-government and contained the following stipulations in that connection:

"ARTICLE IV. The United States do hereby solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek or Seminole Tribe of Indians, and that no portion of either of the tracts of country defined in the first and second articles of this agreement shall ever be embraced or included within, or annexed to, any Territory or State, nor shall either, or any part of either ever be erected into a Territory without the full and

free consent of the legislative authority of the tribe owning the same.

* * * * *

"ARTICLE XV. So far as may be compatible with the constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits; excepting, however, all white persons, with their property, who are not, by adoption or otherwise, members of either the Creek or Seminole tribe; * * *"

The first two items of appropriation hereinbefore mentioned are in fulfillment of that part of Article VIII, of this treaty, wherein the United States agrees and stipulates with the Seminoles—

"* * * Also to invest for them the sum of two hundred and fifty thousand dollars, at five per cent per annum, the interest to be regularly paid over to them *per capita* as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the two sums so invested shall constitute a fund belonging to the United tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them *per capita* as an annuity; * * *"

The Seminole treaty of March 21, 1866 (14 Stat. 757), contains the following provision respecting the continuation of the tribal government:

"ARTICLE VII. The Seminole nation agrees to such legislation as Congress and the President may deem necessary for the better administration of the rights of person and property within the Indian Territory: *Provided, however,* That said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs."

The last two items of appropriation hereinbefore mentioned are in fulfillment of that part of the third article of the treaty of March 21, 1866, wherein the United States agreed to pay to the Seminoles the further sum of—

"* * * seventy thousand dollars, to remain in the United States treasury, upon which the United States shall pay an annual interest of five percent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools; the remainder of the seventy thousand dollars, being twenty thousand dollars, shall remain a permanent fund, the interest of which shall be paid annually for the support of the Seminole government; * * *."

As affecting the first two items of appropriation hereinbefore mentioned the act of Congress of April 15, 1874 (18 Stat. 29), provides:

"That the Commissioner of Indian Affairs, with the sanction of the Secretary of the Interior and the President of the United States, in distributing and paying annuities, interest, or other moneys now due or hereafter to become due to the Seminole tribe of Indians under the provisions of the eighth article of the treaty between the Creek and

Seminole Indians and the United States, concluded August seventh, eighteen hundred and fifty-six, shall be authorized to expend the same for such objects as will best promote the comfort, civilization, and improvement of the Seminole Indians, or in his discretion, with the sanction of the Secretary and the President aforesaid, shall be authorized to pay such annuities or any part thereof into the treasury of the Seminole nation to be used as the council of the same shall provide, instead of paying the same per capita according to the terms of said treaty: *Provided,* That said agreement shall provide that the sum of five thousand dollars shall be annually appropriated out of said annuity to the school fund of said tribe: *And provided further,* That the consent of said tribe to such expenditures and payment shall be first obtained."

By the act of the Seminole legislature (also called council) of April 2, 1879, the tribe consented that all annuities then due or thereafter to become due to it under the provision of the 8th article of the said treaty of August 7, 1856, should be paid into the Treasury of the Seminole nation to be used as the council of the same should provide, instead of being paid per capita according to the terms of said treaty, and by said Seminole act it was further provided that the sum of $5,000 should be annually appropriated out of said annuity to the school fund of said tribe. In pursuance of said act of Congress of April 15, 1874, and of the consent of the tribe so given by the act of its legislature, the Commissioner of Indian Affairs, with the sanction of the Secretary of the Interior and the President of the United States, has since April 2, 1879,

regularly paid into the treasury of the Seminole nation, to be used as the council of the same should provide, the annuities due to said tribe under the provisions of the 8th article of the said treaty of August 7, 1856, and the sum of $5,000 has annually been appropriated by the said tribe out of said annuity to the school fund of said tribe.

Following the said act of Congress of April 15, 1874, and the Seminole act of April 2, 1879, the Commissioner of Indian Affairs in his discretion, with the sanction of the Secretary of the Interior and the President of the United States, now desires to pay into the treasury of the Seminole nation as heretofore the annuities named in the first two items of appropriation hereinbefore mentioned, to be used as the council of the same shall provide, if section 19 of the act of Congress of June 28, 1898 (Public, No. 162), entitled "An Act for the protection of the people of the Indian Territory and for other purposes", does not prohibit the further payment of said annuities into the tribal treasury.

Heretofore the money annually appropriated by Congress for the support of the Seminole schools and for the support of the Seminole government, respectively, in fulfillment of the 3d article of the treaty of March 21, 1866, has been paid under the direction of the Secretary of the Interior to the treasurer of said tribe, to be applied to said purposes and expended according to the laws of the tribe, and it is now desired by the Commissioner of Indian Affairs and the Secretary of the Interior that the moneys embraced in the last two items of appropriation hereinbefore mentioned shall now be paid as heretofore to the treasurer of said tribe to be applied to said purposes and ex-

pended according to the laws of the tribe, if section 19 of the act of Congress of June 28, 1898, *supra,* does not prohibit the further payment of said moneys to the tribal treasurer.

By act of Congress of March 2, 1889 (25 Stat., 980, 1004), certain moneys were appropriated to pay the Seminoles for the release and conveyance of certain lands, which moneys were to be paid as follows:

"* * * One million five hundred thousand dollars to remain in the Treasury of the United States to the credit of said nation of Indians and to bear interest at the rate of five per centum per annum from July first, eighteen hundred and eighty-nine, said interest to be paid semiannually to the treasurer of said nation, and the sum of four hundred and twelve thousand nine hundred and forty-two dollars and twenty cents, to be paid to such person or persons as shall be duly authorized by the laws of said nation to receive the same, at such times and in such sums as shall be directed and required by the legislative authority of said nation, to be immediately available * * *."

Upon the execution and delivery of the required release and conveyance, the said sum of $412,942.20 was paid to the treasurer of the tribe, he being authorized by a law of the nation to receive the same, and since then the semiannual interest on the said $1,500,000, has been regularly paid "to the treasurer of said nation" to be used, applied, and expended according to the laws of the tribe. An instalment of this interest fell due July 1, 1898, but this Department is not yet advised whether it has been paid to the tribal treasurer or is being withheld pend-

ing the consideration of the provisions of section 19 of the act of June 28, 1898, *supra.*

The four items of appropriation for the Seminoles made by the Indian appropriation act of July 1, 1898, *supra;* and the annual interest on the $1,500,000, under the act of March 2, 1889, *supra,* make the total annual income or revenue of the Seminoles from funds held by the United States $103,500.00. Under the laws of that nation or tribe this income or revenue is appropriated, used, applied, and expended in the payment of the expenses of maintaining and conducting the tribal government, including an executive office, a legislature (or council), courts, constabulary, public schools, charitable and penal institutions, public roads, and bridges, etc., the annual appropriation for public schools being $24,000.

The act of Congress of June 28, 1898 (Public No. 162), entitled "An Act for the protection of the people of the Indian Territory and for other purposes", chiefly relates to the affairs and government of the Five Civilized Tribes of Indians in said Territory, the Seminole tribe being one of them. Section 19 of this act provides:

"That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States and the same shall not be liable to the payment of any previously contracted obligation."

This section as it passed the House of Representatives did not contain the words "by the United States" following the words "hereafter be made" in the first part of the section, but did contain the words "all expenses incurred in transacting their business and of" following the words "but payments of" near the middle of the section. In the course of the consideration of the measure in the Senate the section was amended by inserting the words "by the United States" as above indicated and by striking out the words "all expenses incurred in transacting their business and of", as above indicated. A copy of the bill, H. R. 8581, as it passed the House of Representatives, with the Senate amendments shown therein, accompanied the letter of the Acting Secretary of the Interior of the 23d ultimo, requesting a ruling by you respecting the payment of certain appropriations made for the Creek Indians.

By act of Congress of July 1, 1898 (Public, No. 172), entitled "An Act to ratify the agreement between the Dawes commission and the Seminole nation of Indians", an agreement negotiated between the Seminoles and the Dawes commission, bearing date December 16, 1897, was ratified by Congress and all laws and parts of laws inconsistent therewith were thereby repealed. This agreement seems to recognize the existing tribal government of the Seminoles and to contemplate a continuance thereof for the time being, although it also seems to contemplate and to be intended to lead up to, an ultimate extinguishment of the tribal government. The effect of this agreement upon existing treaty stipulations is therein stated in these words:

"This agreement shall in nowise affect the provisions of existing treaties between the Seminole nation and the United States except insofar as it is inconsistent therewith."

The only provisions in this agreement regulating the payment of money to the Seminole tribe, are contained in the three following stipulations therein:

"Should there be discovered on any allotment any coal, mineral, coal oil, or natural gas, and the same should be operated so as to produce royalty, one-half of such royalty shall be paid to such allottee and the remaining half into the tribal treasury *until extinguishment of tribal government,* and the latter shall be used for the purpose of equalizing the value of allotments; and if the same be insufficient therefor, any other funds belonging to the tribe, *upon extinguishment of tribal government,* may be used for such purpose, so that each allotment may be made equal in value as aforesaid.

* * * * *

"Five hundred thousand dollars ($500,000) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five per cent interest, or invested so as to produce such amount of interest, which shall be, *after extinguishment of tribal government,* applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of the Seminole people; * * *

* * * * *

"All moneys belonging to the Seminoles *remaining after equalizing the value of al-*

lotments as herein provided and reserving said sum of five hundred thousand dollars for school funds shall be paid per capita to the members of said tribe in three equal instalments, the first to be made as soon as convenient *after* allotment and *extinguishment of tribal government,* and the others at one and two years, respectively. Such payments shall be made by a person appointed by the Secretary of the Interior, who shall prescribe the amount of and approve the bond to be given by such person; and strict account shall be given to the Secretary of the Interior for such disbursements."

A question has arisen whether the money due to the Seminole tribe under the Indian appropriation act of July 1, 1898, aforesaid, and the interest on the $1,500,000 under the act of March 2, 1889, aforesaid, can all, or any of it, be now paid into the tribal treasury, as heretofore, or whether such money must be paid out and disbursed "under direction of the Secretary of the Interior by an officer appointed by him" pursuant to section 19 of the act of June 28, 1898, aforesaid.

The Seminole tribe insist that all of said money can be, and should be, paid as heretofore, into the tribal treasury, to be applied and expended according to the laws of the tribe. In this connection the tribe contends:

First, That section 19 only prohibits the payment of money "to any of the tribal governments or to any officer thereof *for disbursement*", and that the word "disbursement", as here employed, means distribution in the sense of a division among the members and does not include the payment of expenses incurred in the course of maintaining and conducting the tribal gov-

ernment. It is claimed that this is shown (a) by the striking out of the words "all expenses incurred in transacting their business and of" from the section as it passed the House of Representatives; (b) by the fact that otherwise construed the two parts of the section are not coextensive or harmonious, the first part of the section withholding all moneys of every kind from the tribal government and its officers, while the succeeding part of the section only regulates payments to members or per capita payments; in other words, that no provision is made for the payment of the expenses of maintaining and conducting the tribal government to which the moneys are appropriated and applied under the tribal laws, the new and substituted provision for disbursement only applying to payments to members or per capita payments, while the expenses incurred in maintaining and conducting the tribal government are not incurred on the per capita plan and in many instances are to be paid to persons who are not members of the tribe, as in the case of payments to teachers in the public schools; (c) by the fact that contemporaneously with the adoption of section 19, and as a part of the same act (sections 29 and 30), agreements with the Choctaws and Chickasaws and with the Muscogees or Creeks were ratified, containing the following stipulations, respectively:

"That all per capita payments hereafter made to the *members* of the Choctaw or Chickasaw nations shall be paid directly to each individual member by a bonded officer of the United States, under the direction of the Secretary of the Interior, which officer shall be required to give strict account for such disbursements to said Secretary.

"All payments hereafter to be made to the members of the said nation shall be paid directly to each individual member by a bonded officer of the United States, under the direction of the Secretary of the Interior, which officer shall be required to give strict account for such disbursements to the Secretary."

and by the fact that the Seminole agreement ratified almost simultaneously (July 1, 1898) contains a similar provision (hereinbefore quoted), all being limited to a regulation of payments to members or per capita payments—the claim advanced in this connection being that the provisions of these three agreements upon this subject are *in pari materia* with section 19 and all should be construed together, and that so construed section 19 does not include payments which are not otherwise directed by law to be made to members or per capita; (d) by the fact that the following provision of the act of June 7, 1897 (30 Stat. 62, 84):

"That on and after January first, eighteen hundred and ninety-eight, all acts, ordinances, and resolutions of the council of either of the aforesaid Five Tribes passed shall be certified immediately upon their passage to the President of the United States and shall not take effect, if disapproved by him, or until thirty days after their passage; *Provided*, That this act shall not apply to resolutions for adjournment, or any acts, or resolutions, or ordinances in relation to negotiations with commissioners heretofore appointed to treat with said tribes."

was entirely repealed as to the Seminoles by the terms of the agreement with that tribe ratified July 1, 1898, and was repealed as to

tribal laws appropriating money for the regular and necessary expenses of the tribal government by the agreements with the Choctaws and Chickasaws and with the Muscogees or Creeks ratified by the act of June 28, 1898, thereby manifesting the intention of Congress to commit to these tribes the full control heretofore exercised over the expenses of maintaining and conducting the tribal governments.

SECOND. That section 19 does not require that money payable in any other form or manner be changed or converted into payments to members or per capita payments, but only directs that such payments to members or per capita payments as are elsewhere and otherwise provided for by law shall be made under the direction of the Secretary of the Interior, according to the provisions of that section. In this connection, the tribe claims that by the action of the tribe and of the Commissioner of Indian Affairs, under the act of April 15, 1874, *supra*, the interest payments provided for by the eighth article of the treaty of August 7, 1856, which include the first two items of appropriation hereinbefore mentioned, were changed and converted from per capita payments into payments for school and other tribal purposes; that the payments of interest provided for by the third article of the treaty of March 21, 1866, which include the last two items of appropriation hereinbefore mentioned, and the payments of interest provided for by the act of March 2, 1889, *supra*, have never been directed to be made to members or per capita but were directed to be made otherwise; and that therefore the pending payments to the Seminole tribe, under the Indian appropriation act of July 1,

1898, and the act of March 2, 1889, do not any of them come within the provisions of section 19.

THIRD. That if section 19, properly construed, applies to the payment of the expenses of maintaining and conducting the tribal governments it is repealed, as to the Seminole tribe, by the subsequent act of July 1, 1898, ratifying the new agreement with that tribe and repealing "all laws and parts of laws inconsistent therewith", because that agreement, as a whole and in every essential particular, shows that the intent and purpose of Congress and the Seminole tribe was to continue the existing tribal government with all of its official machinery, until the affairs of the tribe are concluded and the tribe is ready to go out of existence.

Because of the importance of the questions presented, and the necessity of having an authoritative decision thereof, I beg that under the provisions of the act of July 31, 1894 (28 Stat. 162, 208), you will decide whether the moneys appropriated for the Seminole tribe, by the Indian appropriation act of July 1, 1898, and the interest money provided for by the act of March 2, 1889, can now, as heretofore, be paid into the tribal treasury, or whether such moneys are now required to be paid or disbursed "under the direction of the Secretary of the Interior by an officer appointed by him," pursuant to the provisions of section 19 of the act of June 28, 1898.

It seems unnecessary to enter into a critical analysis of the language of section 19 of the act of June 28, 1898 (Public, No. 162), for reasons which will presently appear.

The agreement made between the Dawes Commission and the Seminole Indians, December 16, 1897, was ratified by Congress by the act of July 1, 1898 (Public No. 172). The enacting clause of this act provides:

> That the same be, and is hereby, ratified and confirmed, *and all laws and parts of laws inconsistent therewith are hereby repealed.*

If section 19 of the act of June 28, 1898, is inconsistent with the provisions of the agreement, which was ratified by the act of July 1, 1898, the former has been repealed so far as the Seminole Indians are concerned.

There is a clause in the agreement as follows:

> This agreement shall in nowise affect the provisions of existing treaties between the Seminole Indians and the United States, except insofar as it is inconsistent therewith.

From the foregoing it clearly appears that the rights and duties of the Seminole Indians are to be measured by the provisions of existing treaties construed in the light of and together with the agreement of December 16, 1897.

> This agreement shall be binding on the United States when ratified by Congress and on the Seminole people when ratified by the general council of the Seminole Nation.

The agreement has been ratified by both parties, and, therefore, it will control in the disposition of the question presented.

From the presentation of the case as it appears in your letter it seems to me clear that it was not the intention of the agreement, nor does that instrument in fact deprive the Seminole tribal gov-

ernment of its privilege and duty of disbursing its own funds *prior to the time of the extinguishment of its tribal government,* which extinguishment is evidently contemplated in the near future; therefore, I am of opinion that the moneys due these Indians can be turned over to the tribal authorities for disbursement until such time as the tribal government shall be extinguished.

Respectfully yours,

L. P. MITCHELL,
Assistant Comptroller.
J. D. T.

CCM 7

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE TREASURY,
WASHINGTON, *October 19, 1906.*

The honorable the SECRETARY OF THE INTERIOR.

SIR: I have received your letters of October 8 and 12, 1906 (I. T. D.) in reference to the method of disbursing moneys due the Seminole tribe of Indians. The questions upon which you ask my decision are the following:

1. Whether, under the provisions of sections 11 and 28 of the act of April 26, 1906 (34 Stat. 137), expenditures from the tribal funds and distribution of annuities arising therefrom to members of the Seminole tribe should be made by the tribal authorities of the Seminole Nation or under the direction of the Secretary of the Interior.

2. Whether the Secretary of the Interior is authorized, under section 10 of the act of April 26, 1906 (34 Stat. 137), to refuse to turn over the interest due the Seminole Nation from its school funds to its tribal authorities, and to retain the

same to be used under the direction of the Secretary in defraying the expenses of schools in the Seminole Nation,

The act referred to is entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes." Sections 10, 11, 28, and 29, so far as they affect the questions are as follows:

> SEC. 10. That the Secretary of the Interior is hereby authorized and directed to assume control and direction of schools in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, with the lands and all school property pertaining thereto, March fifth, nineteen hundred and six, and to conduct such schools under rules and regulations to be prescribed by him, retaining tribal educational officers, subject to dismissal by the Secretary of the Interior, and the present system so far as practicable, until such time as a public-school system shall have been established under Territorial or State government, and proper provision made thereunder for the education of the Indian children of said tribes, and he is hereby authorized and directed to set aside a sufficient amount of any funds, invested or otherwise, in the Treasury of the United States, belonging to said tribes, including the royalties on coal and asphalt in the Choctaw and Chickasaw nations, to defray all the necessary expenses of said schools, using, however, only such portion of said funds of each tribe as may be requisite for the schools of that tribe, not exceeding in any one year for the respective tribes the amount expended for the scholastic year ending June thirtieth, nineteen hundred and five; * * *

SEC. 11. That all revenues of whatever character accruing to the Choctaw, Chicasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. All such claims arising before dissolution of the tribal governments shall be presented to the Secretary of the Interior within six months after such dissolution, and he shall make all rules and regulations necessary to carry this provision into effect and shall pay all expenses incident to the investigation of the validity of such claims or indebtedness out of the tribal funds: * * *

SEC. 28. That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: *Provided*, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: *Provided further*, That no contract involving the pay-

> ment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof shall be of any validity until approved by the President of the United States.
>
> SEC. 29. That all Acts and parts of Acts inconsistent with the provisions of this Act be, and the same are hereby, repealed.

In the decision of this office, dated August 23, 1898 (7 MS. Dec. 350), it was held that section 19 of the act of June 28, 1898 (30 Stat. 502), requiring that no moneys on any account whatever should be paid to tribal authorities, but be paid out under the direction of the Secretary of the Interior, did not apply to the Seminoles. The reason for that holding was that the later act of July 1, 1898 (30 Stat. 567), ratifying and confirming an agreement with the Seminoles, expressly repealed all laws and parts of laws inconsistent with the later act. It was therefore further held that the act of June 28, 1898, *supra,* did not deprive the Seminole tribal government of its privilege and duty of disbursing its own funds prior to the extinguishment of its tribal government.

The act of April 26, 1906, *supra,* by section 28, specifically continues the tribal existence and present tribal governments of the Five Civilized Tribes and naming each of them.

Your first question can only be answered by considering whether section 11 of the act of 1906 does deprive the Seminole tribal government of its right to disburse its own funds while the tribal government continues, a right which the Controller held was preserved in the agreement between the United States and the Seminoles, ratified July 1, 1898.

Under treaties of August 7, 1856, and March 21, 1866, the Seminoles are entitled to appropriations of $28,500 each year, being the interest at five per centum per annum on $570,000. Such appropriations are made from year to year. By the act of March 2, 1889 (25 Stat. 1004), it was provided that $1,500,000, a part of the price of lands purchased by the United States from the Seminoles, should remain in the Treasury and five per centum per annum thereon should be paid semiannually to the treasurer of the Seminole Nation. By the agreement which was ratified in the act of July 1, 1898 (30 Stat. 567), it was provided that:

> Five hundred thousand dollars ($500,000) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five percent interest, or invested so as to produce such amount of interest, which shall be, after extinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of the Seminole people.

By the act of April 15, 1874 (18 Stat. 29), it was provided that the annual payment of $25,000 under the treaty of 1856 might be paid into the treasury of the Seminole Nation to be used as the council of the Nation should provide, if the tribe consented thereto and agreed to appropriate $5,000 annually for the school fund. This consent and agreement was given and made by the Seminoles.

An examination of the language in the first sentence in section 11 of the act of April 26, 1906,

supra, makes it clear that the revenues accruing to the tribes, which revenues are to be collected by an officer appointed by the Secretary of the Interior, do not include the interest on moneys of the Seminole tribe in the Treasury of the United States. By treaty, law, and agreement with the Seminoles such interest is required to be paid into the tribal treasury. Neither the act of 1906, nor earlier laws, make specific provision for the distribution of the interest money among the members of the tribe. There is, in my opinion, no authority in section 11 for the Secretary to make distribution of annuities arising from tribal funds to members of the Seminole tribe. Neither from the language of the section, nor by implication, can such authority be found. Nor is there authority in that section for the Secretary to apply such interest to the payment of any obligations except lawful claims against the tribe contracted after July 1, 1902, or for which warrants have been regularly issued. As to such claims and such warrants full authority is given to the Secretary of the Interior to use any fund in the United States Treasury belonging to the tribe to make payment, and that authority continues as to claims contracted or warrants issued prior to dissolution of the tribal government.

In answer to your first question, I am of the opinion that expenditures from the tribal funds, and distribution of annuities arising therefrom to members of the Seminole tribe should be made by the tribal authorities of the Seminole Nation, subject, however, to the approval of the President so far as required by section 28 of the act; and ex-

cept as the right and duty is devolved upon you to disburse so much of the funds as is necessary to carry out the requirements of section 11 as to payment of lawful claims and warrants, and to carry out the requirements of section 10 as to schools.

I answer your second question in the affirmative. Section 10 of the act of April 26, 1906, contains specific authority and direction for you to assume control and direction of the schools in the Seminole tribe, and to use the money of the tribe, invested or otherwise, in the Treasury of the United States, not exceeding in any one year the amount expended for the scholastic year ended June 30, 1905.

I have not overlooked the briefs you forwarded and the argument made by counsel for the Seminoles, that the treaties and agreements made by the United States are contracts which cannot be modified by Congress without the consent of the tribe, and that Congress cannot dispose of the moneys and property of the tribe at will.

I have not discust this question because, so far as the Controller is concerned, the plain requirements of the latest act of Congress are to be followed. Such an act may repeal an earlier act or a treaty. Whether the later act invades property rights of the tribe, or annuls contracts and confiscates Seminole property, as is contended, is not a question for my decision. Nor has the Controller authority to right such wrongs if they exist or give compensation therefor.

I have, however, given full weight to the principle that an Act of Congress should not be construed to repeal in whole or in part a treaty right

unless such a construction is required by the language used in such act.

I return the letters and papers which you transmitted.

Respectfully,

R. J. TRACEWELL,
Comptroller.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE ASSISTANT ATTORNEY-GENERAL,
Washington, July 12, 1898.

THE SECRETARY OF THE INTERIOR.

Sir: By your communication of July 9, 1898, I am asked for an opinion whether section 19 of an act of Congress approved June 28, 1898 (Public, No. 162), entitled "An act for the protection of the people of the Indian Territory, and for other purposes", applies to the Seminole Nation of Indians.

Said section is as follows:

> That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.

It is submitted that until the passage of this act it had been the practice of this Department, under the laws and regulations then in force, to deposit "such funds" in bulk with the Assistant Treasurer of the United States, at St. Louis, to

the credit of the treasurers of "these tribes", to be disbursed by them in their own way, under the laws of their respective nations.

By the expression "such funds" and "these tribes", used in your communication, I take it is meant moneys due any of the five civilized tribes from the United States government. The practice of this Department, therefore, has been to deposit any moneys, subject to disbursement on account of these tribes, with the Assistant Treasurer, at St. Louis, to the credit of the treasurers thereof, to be disbursed by them without the further supervision of the government.

Section one of the act, *supra,* provides that the word "officer", where the same appears in the criminal laws theretofore extended over and put in force in the Indian Territory, shall include all officers "of the several tribes or nations of Indians in said Territory."

Section 2 authorizes and requires the Judge of a United States Court of any district in said Territory to make "any tribe" of Indians a party to any suit pending in his court where it appears that the property of such tribe is in any way affected by the issues being heard.

Section 3 confers jurisdiction on the United States district courts in said Territory to try cases against persons who claim to hold lands and tenements as members of a tribe, and whose membership is denied by the tribe, and provides that "if it be found upon trial that the same are held unlawfully against the tribe by those claiming to be members thereof, and the membership and right are disallowed by the commission to the *Five Tribes,* or the United States court * * * then

said court shall cause the parties charged with unlawfully holding said possessions to be removed from the same and cause the lands and tenements to be restored to the person or persons or nation or tribe of Indians entitled to the possession of the same."

Section 4 provides "That all persons who have heretofore made improvements on lands belonging to any one of the said tribes of Indians" may under certain conditions sell and dispose of the same.

Section 11 provides for the allotment of lands when the roll of citizenship of "any one of said nations or tribes" is fully completed.

Section 15 provides, "That there shall be a commission in each town for each one of the Chickasaw, Choctaw, Creek and Cherokee tribes", who shall cause to be surveyed and laid out townsites.

Section 16 makes it unlawful for any person to claim, demand, or receive any royalty or rents on any lands or property belonging to "any one of said tribes or nations in said Territory."

Section 17 provides that it shall be unlawful for "any citizen of any one of said tribes" to hold possession of more than his approximate share of the allotted lands.

It is apparent from these excerpts from the act that section 19 prohibits the payment by the United States of moneys on any account whatever to officers or tribal governments of *any* of the five civilized tribes.

The Seminole Indians as such are nowhere mentioned in the act, but these Indians constitute one of the five civilized tribes, and are within the inhibition of said section, unless, as to them, it has been repealed by subsequent legislation.

An act approved July 1, 1898 (Public, No. 172), ratified the agreement of December 16, 1897, between the Dawes Commission and the Seminole Nation of Indians. One of the stipulations of that agreement was, that:

> All moneys belonging to the Seminoles remaining after equalizing the value of allotments as herein provided, and reserving said sum of five hundred thousand dollars for school fund, shall be paid per capita to the members of said tribe in three equal instalments, the first to be made as soon as convenient, after allotment and extinguishment of the tribal government. Such payments shall be made by a person appointed by the Secretary of the Interior, who shall prescribe the amount of and approve the bond to be given by such person; and strict account shall be given to the Secretary of the Interior for such disbursements.

The act *supra,* which ratifies and confirms this agreement, repeals "all laws and parts of laws inconsistent therewith."

There is nothing in the language quoted inconsistent with the provisions of section 19 of the act of June 28, 1898, *supra.* Indeed, these provisions in the two acts are substantially the same. The provision in the Seminole act that "all moneys belonging to the Seminole Indians * * * shall be paid *per capita* to the members of said tribe", the first payment to be made after the "extinguishment of tribal government" "by a person appointed by the Secretary of the Interior", is the substantial equivalent of the language used in the general act that payments shall not be made "to any of the tribal governments or any officer thereof",

but shall be made per capita direct to each individual, "under direction of the Secretary of the Interior by an officer appointed by him."

I have therefore to advise that section 19 of the act of June 28, 1898, applies to the Seminole Nation of Indians. Moreover, it results from what has been hereinbefore said that whether that act applies or not, the manner of disbursement under the Seminole act must be the same.

Very respectfully,

WILLIS VAN DEVANTER,
Assistant Attorney General.

DEPARTMENT OF THE INTERIOR,
July 12, 1898.

Approved:
THOS. RYAN,
Acting Secretary.

CONGRESSIONAL RECORD, 55TH CONGRESS, 2ND SESSION, VOL. 31, PART IV, PAGE 3869 (APRIL 14, 1898)

As introduced, the Curtis Bill (H. R. 8581, 55th Congress) provided in Section 19 as follows:

> That no payment of any moneys on any account whatever shall hereafter be made to any of the tribal governments or to any officer thereof for disbursement, but payments of all expenses incurred in transacting their business and of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.

U. S. GOVERNMENT PRINTING OFFICE: 1933

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 172

THE UNITED STATES, PETITIONER

v.

THE SEMINOLE NATION

REPLY MEMORANDUM FOR PETITIONER

In its brief in opposition the respondent suggests that this Court lacks jurisdiction of the Government's petition for certiorari. It is submitted that this point is without merit.

The judgment of the Court of Claims was entered December 2, 1935 (R. 29). A motion for new trial was made February 6, 1936, and denied March 2, 1936 (R. 30). On May 13, 1936, the Government filed a motion for leave to file a second motion for new trial (R. 30). Although this motion for leave to file did refer to R. S. Sec. 1088 as an explanation for the Government's request, it did not state that the attached second motion for a new trial was based on R. S. Sec. 1088 (R. 30). Moreover, the attached motion, which

spoke for itself, made no reference to R. S. Sec. 1088 and was a general motion.

On May 18, 1936, the lower court granted the motion for leave to file the second motion for a new trial (R. 30). The second motion for a new trial, unlimited in phraseology, was filed on May 18, 1936 (R. 30). Then, as the brief in the lower court shows, it was argued on June 1, 1936 (R. 30) on a broad basis without being limited to R. S. Sec. 1088. The second motion for a new trial was entertained by the Court of Claims and was overruled on June 8, 1936 (R. 30). *It is upon this second motion for a new trial* (not, as the respondent supposes, upon the preceding motion for leave to file the second motion for a new trial) *that the Government bases its contention that this Court has jurisdiction.* In this contention the Government is fully supported by *Gypsy Oil Co.* v. *Escoe,* 275 U. S. 498, where it is pointed out (p. 499):

> If, however, a timely motion for leave to file the second petition is granted, and the petition is actually entertained by the Court, then the time within which application may be made here for certiorari begins to run from the day when the Court denies such second petition.

Respectfully submitted.

STANLEY REED,
Solicitor General.

OCTOBER 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 172

THE UNITED STATES

v.

THE SEMINOLE NATION

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims was rendered December 2, 1935, but has not yet been reported.

JURISDICTION

Petition for writ of certiorari was filed July 8, 1936 (R. 34), and granted October 12, 1936.

The jurisdiction of this Court is invoked under Section 4 of the Act of May 20, 1924, c. 162, 43 Stat. 133, 134, and Section 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939, U. S. C., Title 28, Sec. 288.

The judgment of the Court of Claims was entered December 2, 1935 (R. 29). A motion for new trial

was made February 6, 1936, and denied March 2, 1936 (R. 30). On May 13, 1936, the Government filed a motion for leave to file a second motion for new trial (R. 30). Although this motion for leave to file did refer to R. S. Sec. 1088 as an explanation for the Government's request, it did not state that the attached second motion for new trial was based on R. S. Sec. 1088 (R. 30). Moreover, the attached motion, which spoke for itself, made no reference to R. S. Sec. 1088 and was a general motion.

On May 18, 1936, the lower court granted the motion for leave to file the second motion for new trial (R. 30). The second motion for new trial, unlimited in phraseology, was filed on May 18, 1936 (R. 30). Then it was argued on June 1, 1936 (R. 30), on a broad basis without being limited to R. S. Sec. 1088. The second motion for new trial was entertained by the Court of Claims and was overruled on June 8, 1936 (R. 30). *It is upon this second motion for new trial* (not, as the respondent has suggested, upon the preceding motion for leave to file the second motion for new trial) *that the Government bases its contention that this Court has jurisdiction* to review the judgment originally entered (not, as the respondent has suggested, to review the order overruling the motion for new trial. In this contention the Government is fully supported by *Gypsy Oil Co* v. *Escoe,* 275 U. S. 498, where it is pointed out (p. 499):

If, however, a timely motion for leave to file the second petition is granted, and the petition is actually entertained by the Court, then the time within which application may be made here for certiorari begins to run from the day when the Court denies such second petition.

QUESTIONS PRESENTED

1. Whether the claims adjudicated by the Court of Claims were presented to it for decision in the time within which the United States had consented to be sued.

2. Whether Section 19 of the Curtis Act changed the purposes for which, and the persons to whom, moneys due under trusts and statutes relating to the Seminoles should be paid.

3. Whether the Seminoles have a right of action if Section 19 of the Curtis Act is violated.

4. Whether the Seminoles are estopped to complain of any violation of Section 19 of the Curtis Act.

5. Whether Article III of the Treaty of 1866 allowed the Government to pay, from 1875 through 1896, interest on the $50,000 trust to the Seminole tribal treasurer; and, if not, whether the Seminoles are estopped to complain of a violation.

6. Whether any statutes gave to the executive officers of the Government authority to make disbursements of principal of the $500,000 trust fund set apart by the Seminole Agreement of 1897.

7. Whether the Government broke the promise given in Article VI of the Treaty of 1866; and if so, whether the lower court applied a correct rule of damages.

8. Whether any statutes or treaties authorized or ratified the diversion to loyal refugee Indians of the amounts appropriated from 1858 to 1866 for Seminole schools, agricultural assistance, and blacksmiths.

9. Whether, in the absence of a formal counterclaim, the Government was entitled to have the lower court adjudicate its claim that, against its underpayments in some years of interest on trusts, there should be offset overpayments and miscellaneous payments in other years.

TREATIES AND STATUTES INVOLVED

In the Appendix, separately printed, there are set forth, first, the statutes upon which the jurisdiction of the Court of Claims is based; next, the treaties with the Seminole Indians; then, in chronological order, the other statutes involved; then, the relevant opinions of the Comptroller of the Treasury and of Assistant Attorney General Van Devanter; and, finally, excerpts from reports of the General Accounting Office (which are relied upon not as evidence, but for illustrative purposes, see pages ~~89, 91–92~~, *infra*).

STATEMENT

The Act of May 20, 1924, c. 162, 43 Stat. 133, as amended by the Act of Feb. 19, 1929, c. 268, 45

Stat. 1229, conferred upon the Court of Claims jurisdiction to adjudicate claims of the Seminole Indians against the United States growing out of treaties, agreements, or statutes of the United States, provided that suit was instituted by June 30, 1930 (R. 9–10, fdg. I).

On February 24, 1930, the Seminole Nation (hereinafter called the "Seminoles") filed in the Court of Claims a petition (R. 1–3) alleging that it "was the owner of large trust funds, held in trust by the defendant [the Government] for its use and benefit, and that there existed various treaties and agreements between said plaintiff and defendant whereby said trust funds were to be managed and invested by defendant, and the interest thereon paid over to the National Treasurer of plaintiff" (R. 1, par. II); that after the Curtis Act, Act of June 28, 1898, c. 517, 30 Stat. 495, the Government impounded the funds, "refused to further pay them over to plaintiff's National Treasurer, and proceeded to disburse them for various purposes" (R. 1, par. III); and that "from July 1st, 1898, until the present time, defendant * * * in violation of the rights of plaintiff under its various treaties and agreements with defendant, and without authority of Congress, has spent large sums of the trust funds" (R. 2, par. VI). The petition prayed that "defendant be required to file in this cause a statement showing its expenditures of plaintiff's funds *during said period*" [i. e., July 1, 1898, to February 24, 1930] and that "plaintiff

have judgment against the defendant in such sum or sums as appear to this court to be *expended* without authority of law" (R. 2, par. VIII).

On September 19, 1934, the Seminoles filed an amended petition (R. 3–8). In addition to repeating the earlier allegations of a wrongful expenditure between July 1, 1898, and the present time, of trust funds created by treaties and agreements, the amended petition presented for adjudication claims for failure to make payments due under trusts created by treaties, agreements, and statutes, both before and after 1898, and claims for failure to make miscellaneous payments due under treaties. These claims are so numerous that it will be convenient to state, first, the claims arising out of the trust funds, and then the miscellaneous claims.

A. TRUST FUND CLAIMS

There were, in all, four trusts held by the Government for the benefit of the Seminole Nation:

1. A trust fund of $500,000 (originally two funds, each of $250,000), established by Article VIII of the Treaty of August 7 ,1856, 11 Stat. 699, 702, upon which the Government agreed to pay annual interest of $25,000 (R. 11, fdg. III). The terms of this trust are stated in the margin.[1]

---

[1] By article VIII of the Treaty of 1856, the United States agreed with the Seminoles—

> * * * to invest for them the sum of two hundred fifty thousand dollars, at five percent. per annum, the interest to be regularly paid over to them *per capita*

2. A trust fund of $70,000, established by Article III of the Treaty of March 21, 1866, 14 Stat. 755, 756–757, upon which the Government agreed to pay annual interest of $2,500 for "the support of schools" and annual interest of $1,000 "for the support of the Seminole Government" (R. 12, fdg. VIII). The terms of this trust are stated in the margin.[2]

3. A trust fund of $1,500,000 established by Section 12 of the Indian Appropriation Act for the fiscal year 1890, Act of March 2, 1889, c. 412, 25 Stat. 980, 1004, upon which Congress directed that there be paid annual interest of $75,000 to the

---

as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the two sums so invested, shall constitute a fund belonging to the united tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them *per capita* as an annuity; * * *.

[2] By Article III of the Treaty of 1866, the United States agreed with the Seminole Nation that—

> * * * The balance due the Seminole nation after making said deduction, amounting to one hundred thousand dollars, the United States agree to pay in the following manner, to wit: * * * seventy thousand dollars to remain in the United States Treasury, upon which the United States shall pay an annual interest of five per cent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools; the remainder of the seventy thousand dollars, being twenty thousand dollars, shall remain a permanent fund, the interest of which shall be paid annually for the support of the Seminole goverment.

Seminole tribal treasurer. The terms of this trust are stated in the margin.[3]

4. A trust fund of $500,000, which was originally part of the $1,500,000 just mentioned, but which was "set apart as a permanent school fund" under

[3] The Court of Claims neglected to make a finding with respect to the source of this trust. However, there can be no doubt, as the lower court's opinion, Item 8, apparently recognizes (R. 24), that the trust was set up in these words by Section 12 of the Indian Appropriation Act for the fiscal year 1890:

> SEC. 12. That the sum of one million nine hundred and twelve thousand nine hundred and forty-two dollars and two cents be, and the same hereby is, appropriated, out of any money in the Treasury not otherwise appropriated, to pay in full the Seminole Nation of Indians for all the right, title, interest, and claim which said nation of Indians may have in and to certain lands ceded by article three of the treaty between the United States and said nation of Indians, which was concluded June fourteenth, eighteen hundred and sixty-six, and proclaimed August sixteenth, eighteen hundred and sixty-six, and which land was then estimated to contain two million one hundred and sixty-nine thousand and eighty acres, but which is now, after survey, ascertained to contain two million thirty-seven thousand four hundred and fourteen and sixty-two hundredths acres, said sum of money to be paid as follows: *One million five hundred thousand dollars to remain in the Treasury of the United States to the credit of said nation of Indians and to bear interest at the rate of five per centum per annum from July first, eighteen hundred and eighty-nine, said interest to be paid semiannually to the treasurer of said nation*, and the sum of four hundred and twelve thousand nine hundred and forty-two dollars and twenty cents, to be paid to such person or persons as shall be duly authorized by the laws of said nation to receive the same, at such times and in such sums as shall be directed and required by the legislative authority of said nation, to be immediately available; * * * [Italics added.]

authority conferred by the Seminole Agreement of December 16, 1897, ratified by Act of July 1, 1898, c. 542, 30 Stat. 567, 568. $25,000 of the $75,000 mentioned in the preceding paragraph represents the annual interest on this trust fund (R. 27. Opinion, Item 9). The terms of this trust are stated in the margin.[4]

The Seminoles claim that the Government has in various ways violated its fiduciary duties under each of these trusts. However, with respect to the first three[5] of these trusts, in addition to the differing claims, one common claim was presented, which it will be convenient to state at once.

---

[4] The Act to Ratify the Seminole Agreement of 1897 provided:

> Five hundred thousand dollars ($500,000) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five percent interest, or invested so as to produce such amount of interest, which shall be, after extinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of the Seminole people; and there shall be selected and excepted from allotment three hundred and twenty acres of land for each of said academies and eighty acres each for eight district schools in the Seminole country.

Apparently this $500,000 trust for the education of children was not actually set apart until 1906, which is several years after the Seminole agreement went into effect.

[5] Our petition for certiorari (Pet. 5–6, 22–23) erroneously assumed that the fourth trust was also involved in the lower court's discussion of the Curtis Act (R. 23–26. Opinion, Item 8). See the correction in the respondent's brief in opposition (Br. Opp. 27–28).

The common claim relates to the period from the fiscal year 1899 through the first half of the fiscal year 1907. During this period the Government, under the first three trusts just referred to, was obligated to pay annual interest at the rate of $25,000, plus $3,500, plus $75,000, or a total of $879,750 in 8½ years. The lower court found that for this period the Government did pay the Seminole tribal treasurer $864,702.58 (R. 14, fdg. XII). But the court held that after the passage of Section 19 of the Curtis Act, Act of June 28, 1898, c. 517, 30 Stat. 495, 502, the Government should not have made these payments to the tribal treasurer and that its departure from the statute gave the Seminoles a cause of action. The court thereupon adjudged that the Government was liable to the Seminoles for $864,702.58, the amount theretofore paid to the Seminole tribal treasurer—not $879,750, the amount promised (R. 26. Opinion, Item 8).

In addition to this common claim there are different claims with respect to the first, second, and fourth trusts.

With respect to the $500,000 trust established by the Treaty of 1856, the Seminoles claim that the Government, though it promised to pay $25,000 a year, made underpayments in 1867–1874, 1876, 1879, and 1907–1909. The lower court found that in each of those years there was an underpayment and, after tabulating those underpayments (R. 12, fdg. VI), concluded that the total shortage was

$154,551.28 (R. 19-20. Opinion, Item 3). The Government contended that against this apparent shortage there should be credited as offsets (a) the amounts by which in the years 1875, 1877, 1880, 1882, and 1883 the Government had overpaid the $25,000 promised; (b) the amounts paid in 1870 and 1874 at the request of the Council of the Seminole Nation; and (c) the amounts shown to have been expended in 1908, 1909, 1910, 1919, and 1921 for "Fulfilling Treaties with Florida Indians or Seminoles." The lower court refused to make findings as to, or to allow credits for, these offsets, on the ground that the Government had not formally filed a counterclaim (R. 19–20). Instead the court held the Government liable for the full $154,551.28 (R. 20. Opinion, Item 3).

With respect to the $70,000 trust fund established by the Treaty of 1866, the Government promised to pay $2,500 a year for "the support of schools." The Seminoles claim that in some years the Government made underpayments and in other years payments to the wrong person. Regarding underpayments, the lower court found (R. 13, fdg. IX) for the fiscal years 1867 to 1874, inclusive, that the Government paid $16,902.80 (or an underpayment of $3,097.20) and for the fiscal year 1907, $1,750 (or an underpayment of $750). The Government contended that against these apparent shortages there should be credited as offsets miscellaneous amounts, including particularly those

shown by the General Accounting Office Report to have been expended in 1908, 1909, 1910, 1919, and 1921 for "Fulfilling Treaties with Florida Indians or Seminoles." The lower court, without making any findings as to the Government's contention, and without giving any reasons for its omission, other than that the Government had not filed a counterclaim (R. 20), held the Government liable for underpayments of $3,097.20 and $750 (R. 20–22. Opinion, Item 5). Regarding payments of this $2,500 annuity to the wrong person, the lower court found (R. 13, fdg. IX) that from the fiscal year 1875 to the fiscal year 1907, inclusive, the Government paid annuities directly to the Seminole tribal treasurer. The payments for the latter part of this period, from 1899 to 1907, have already been discussed (see pages 9–10, *supra*) and are considered in Item 8 of the lower court's opinion (R. 23–26). The payments for the period from 1875 to 1898, inclusive, have not heretofore been discussed. The lower court held (R. 20–22. Opinion, Item 5) that these payments from 1875 through 1898 should not have been made to the Seminole tribal treasurer but should have been disbursed by the Government itself for the support of schools. The lower court concluded (R. 22) that the Government was liable for $57,500 (which apparently represents 23 instead of 24 payments at the rate of $2,500 a year).

With respect to the trust fund established by Section 12 of the Indian Appropriation Act of

1890, which originally amounted to $1,500,000, no claim is made other than the common claim already discussed at pages 9–10, *supra.*

With respect to the $500,000 trust fund set apart by the Seminole Agreement of 1897, the Seminoles claim that the Government made unauthorized diversions of principal. The 1897 Agreement stipulated that the $500,000 "shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five percent interest, or invested so as to produce such amount of interest, which shall be, after extinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of the Seminole people" (R. 26–27). The lower court found (R. 14, fdg. XIII) that the Government disbursed from the principal of this fund (a) for per capita payments, $25,744.50 in 1920 and $6,701.06 in 1921; (b) for equalization of allotments, $490.22 in 1921; and (c) for education, $17,743.43 in 1922, $16,679.86 in 1923, $247.94 in 1924, $6,504.72 in 1925, $12,809.52 in 1926, $17,815.59 in 1927, $19,685.35 in 1928, $1.29 in 1929, and $30,031.82 in 1930. The lower court held that all of these disbursements from principal were illegal and the Government was liable for the total diversions, amounting to $154,455.30 (R. 27. Opinion, Item 9).

B. MISCELLANEOUS CLAIMS

1. By Article VIII of the Treaty of August 7, 1856, 11 Stat. 699, 702 (R. 4, fdg. III), the Government promised the Seminoles—

> to provide annually for ten years the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith shops among them, * * * *

During the ten years covered by this article, the fiscal years from 1858 to 1867, inclusive, the Government disbursed in payment of these obligations $10,436.58 (R. 11, fdg. IV). The Government contended that it had disbursed the balance of $61,563.42 for the relief and support of loyal refugee Indians, and that this expenditure, having been authorized by the Resolution of Feb. 22, 1862, No. 13, 12 Stat. 614; Section 1 of the Act of July 5, 1862, c. 135, 12 Stat. 512, 528; Section 3 of the Act of March 3, 1863, c. 99, 12 Stat. 774, 793; Section 2 of the Act of June 25, 1864, c. 148, 13 Stat. 161, 180; and Section 5 of the Act of March 3, 1865; c. 127, 13 Stat. 541, 562, fulfilled the obligation under Article VIII of the Treaty of 1856. The lower court made no finding as to whether the $61,563.42 had actually been expended for the benefit of refugee Indians, but merely held that there was no law authorizing the Government to satisfy its treaty obligation in this manner (R. 17). The Government

also contended that the expenditure of the $61,563.42 for the benefit of refugee Indians was ratified by Article VIII of the Treaty of March 21, 1866, 14 Stat. 755, 759. But the lower court denied the contention, and held the Government liable for the whole balance, $61,563.42 (R. 18, Opinion, Item 1).

2. By Article IX of the Treaty of Aug. 7, 1856, 11 Stat. 699, 703 (R. 11, fdg. III), the Government promised the Seminoles—

> to expend for them in improvements, after they shall all remove, the sum of twenty thousand dollars * * *

The Government, however, disbursed for this purpose only $18,210 (R. 12, fdg. VII). The lower court held the Government liable for the balance of $1,790 (R. 20, Opinion, Item 4).

3. By Article VI of the Treaty of March 21, 1866, 14 Stat. 755, 758 (R. 12–13, Finding VIII), the Government promised the Seminoles—

> that the United States shall cause to be constructed, at an expense not exceeding ten thousand ($10,000) dollars, suitable agency buildings, the site whereof shall be selected by the agent of said tribe, under the direction of the superintendent of Indian affairs; in consideration whereof the Seminole nation hereby relinquish and cede forever to the United States one section of their lands, upon which said agency buildings shall be directed [erected], which land shall revert

> to said nation when no longer used by the United States, upon said nation paying a fair value for said buildings at the time vacated.

The Government disbursed for this purpose the sum of $931.76 (R. 13–14, fdg. XI). The lower court held the Government liable for the difference between that sum and $10,000, or $9,068.24 (R. 22, Opinion, Item 7).

In addition to the foregoing claims other claims, for which certiorari was not petitioned, were adjudicated by the lower court and considered in its opinion under Items 2, 6, 10, 11, 12, and 13.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing to hold that its jurisdiction was limited to claims of the Seminole Nation arising from payments made, after July 1, 1898, by the Government, from trust funds created under Seminole treaties or agreements, to persons other than the Seminole tribal treasurer.

2. In holding that Section 19 of the Curtis Act applied to the three trusts created by Article VIII of the Seminole Treaty of 1856, Article III of the Seminole Treaty of 1866, and Section 12 of the Indian Appropriation Act for the fiscal year 1890, for the benefit of the Seminoles.

3. In holding that the Government is liable to make to the Seminoles a second payment of the $864,702.58 which the Government had already

paid from 1889 to 1907 at their request to the tribal treasurer on account of obligations arising under the said three trusts held for the benefit of the Seminoles.

4. In holding that it was unlawful for the Government, from 1875 to 1898, inclusive, to have paid directly to the Seminole tribal treasurer the interest due on the $50,000 trust fund for the support of schools created by Article III of the Seminole Treaty of 1866; and that the Government is now liable to make to the Seminoles a second payment per capita of any interest so paid.

5. In holding that the Government was not entitled to set off against its underpayments of amounts due under the trust established by Article VIII of the Seminole Treaty of 1856 the amounts by which, in the years 1875, 1877, 1880, 1882, and 1883, the Government had overpaid the $25,000 annuity promised, the amounts paid in 1870 and 1874 at the request of the Council of the Seminole Nation, and the amounts expended in 1908, 1909, 1910, 1919, and 1921 for "Fulfilling Treaties with Florida Indians or Seminoles."

6. In failing to make findings of fact as to the amounts by which, in the years 1875, 1877, 1880, 1882, and 1883, the Government had overpaid the said $25,000 promised annuity, the amounts paid in 1870 and 1874 at the request of the Council of the Seminole Nation, and the amounts expended in 1908, 1909, 1910, 1919, and 1921 for "Fulfill-

ing Treaties with Florida Indians or Seminole Indians."

7. In holding that the Government was not entitled to set off against its underpayments of amounts due under the $70,000 trust established by Article III of the Treaty of 1866 the miscellaneous amounts expended in 1908, 1909, 1910, 1919, and 1921 for "Fulfilling Treaties with Florida Indians or Seminoles."

8. In failing to make findings of fact as to the total amount the Government expended in 1908, 1909, 1910, 1919, and 1921 for "Fulfilling Treaties with Florida Indians or Seminoles", and the portions thereof attributable respectively to the obligations due under the $70,000 trust established under the Treaty of 1866, and the obligations due under the $500,000 trust fund established by the Treaty of 1856.

9. In holding that Congress had not authorized such payments as were made from the principal of the $500,000 trust fund set apart by the Agreement of 1897.

10. In failing to hold that the Government was not liable for a deficiency in the annual payments of $7,200 due under Article VIII of the Treaty of 1856 inasmuch as Congress had authorized the expenditure of those annual payments, and the executive branch of the Government had spent them, for the relief of loyal refugee Indians instead of the purposes originally contemplated.

11. In failing to hold that the Government was not liable for a deficiency in so many of the said annual payments of $7,200 as were due prior to the fiscal year 1867 inasmuch as the Seminoles, by Article VIII of the Treaty of 1866, released any liabilities that might have existed for those years.

12. In failing specifically to find and to hold that to meet the said annual payment of $7,200 for the fiscal year 1867 the Government expended, in the manner provided for in the Treaty of 1866, $3,000 for the support of schools, $2,000 for agricultural assistance, and $2,197.50 for the support of smiths.

13. In holding that the promise in Article VI of the Treaty of 1866 that "the United States shall cause to be constructed, at an expense *not exceeding* ten thousand ($10,000) dollars, suitable agency buildings", should be construed to require the Government to spend the entire $10,000.

14. In holding that by breaking its agreement to erect agency buildings the Government became liable for the difference between the full value of the buildings promised and the cost of the buildings actually erected.

SUMMARY OF ARGUMENT

The statutes on which the jurisdiction of the Court of Claims depended required that claims belonging to the Seminoles be filed by June 30, 1930. By that date the original petition (R. 1–3) was the only pleading filed. According to our analysis, it

presented only one specific set of claims: those which arose from payments made, after July 1, 1898, by the Government, from trust funds, created under Seminole treaties or agreements, to persons other than the tribal treasurer. In giving judgment on other claims which were later presented, the lower court exceeded its jurisdiction and so much of the judgments with respect to them should be reversed, *Finn* v. *United States,* 123 U. S. 227.

Assuming, however, that this Court holds that the lower court had jurisdiction over all the claims presented, we discussed each of them in the following order:

In Point II we consider the claim that the Government is liable to the Seminoles for the amount that it paid out of Seminole trust funds to the tribal treasurer from 1899 through 1907. The Seminoles take the position that these payments were contrary to Section 19 of the Curtis Act, and that the violation gives them a right of recovery. Our first answer is that the language of Section 19 of the Curtis Act is not broad enough to cover the trusts in question; and that an attempt to apply it would change not only the *method* of paying interest but also the *purposes* for which interest is paid. Our second answer is that if Section 19 of the Curtis Act did apply to these trusts, and if it was violated, the Seminoles have no standing to make any complaint. Since the statute was a mere direction from Congress to disbursing officers in

the executive branch of the Government, violation of its terms gave no right of action to private parties; their rights were not infringed unless they also showed that the violation was a breach of contract. *The Sac and Fox Indians,* 220 U. S. 481. Moreover, if the Seminoles have a standing to recover for violations of the Curtis Act, they are estopped since these violations were made at their request and with their consent.

Point III covers the claim that the Government is liable for the amount that it paid to the tribal treasurer from 1875 through 1898 out of the $50,000 trust created by Article III of the Treaty of 1866. We contend that the payment did not violate the terms of the trust, and that if it did, the tribe is estopped to complain since they consented through their official governmental representatives.

Point IV deals with the claim that the executive officers of the Government had been given no authority to spend any part of the principal of the $500,000 trust fund set apart by the Seminole Agreement of 1897. Our contention is that an examination of the relevant statutes shows that the executive officers were given authority for such payments from principal as were made.

Point V concerns the claim of the Seminoles arising from an alleged breach of Article VI of the Treaty of 1866. According to our construction of the Treaty, the promise has not been broken. Even if the respondent's construction be taken,

the lower court has applied an erroneous rule of damages.

In Point VI we take up the claim that the disbursing officers of the Government had no authority to divert to loyal refugee Indians during the Civil War the amounts appropriated for schools, agricultural assistance, and blacksmiths, and that therefore the Government remains liable for the amounts due. We set forth the statutes believed to give the necessary authority, and, while relying on all of them, point particularly to the Indian Appropriation Acts for 1864 to 1866. See pages 83–85, *infra*. We also rely upon the release given by the Seminoles in the Treaty of March 21, 1866.

Point VII, unlike the earlier points, does not attempt to show that a particular claim of the Seminoles is unsound. In that part of the brief we assume *arguendo* the validity of certain Seminole claims of underpayment of interest due on trusts. On that hypothesis we contend that we were entitled, without filing a formal counterclaim, to present for offset overpayments of interest on the same trusts. The lower court ruled to the contrary. It is our position that this ruling of law conflicts with the well-settled rule that "in a bill for an accounting, both parties are actors, and a defendant may have a decree in his favor without the aid of a cross-bill." *Braman* v. *Foss,* 204 Mass. 404, 411. Accordingly we ask that the judgment on this point be reversed and the case remanded.

For the possible convenience of the Court we have printed in the margin a table showing the relation between the order in which the lower court considered the Seminole claims and our order in this brief.[6]

ARGUMENT

I

THE JURISDICTION OF THE COURT OF CLAIMS WAS LIMITED TO CLAIMS OF THE SEMINOLE NATION ARISING FROM PAYMENTS MADE, AFTER JULY 1, 1898, BY THE GOVERNMENT, FROM TRUST FUNDS, CREATED UNDER SEMINOLE TREATIES OR AGREEMENTS, TO PERSONS OTHER THAN THE SEMINOLE TRIBAL TREASURER

We contend that the lower court has adjudicated a number of claims that were outside its jurisdiction.

It is axiomatic that a court has jurisdiction of a suit against the United States only if, and in accordance with the terms upon which, the Government consents to be sued. Accordingly, if the Government consents to suit within a certain period, it

[6] See the following table:

Opinion of the court	This brief	Specification of error
Item 1	I, VI	1, 10, 11, 12.
Item 2		Not specified.
Item 3	I, VII	1, 5, 6.
Item 4	I	1, [illegible]
Item 5	I, III, VII	1, 4, 7, 8.
Item 6		Not specified.
Item 7	I, V	1, 13, 14,
Item 8	I, II	1, 2, 3.
Item 9	IV	9.
Item 10		Not specified.
Item 11		Not specified.
Item 12		Not specified.
Item 13		Not specified.

is essential to the jurisdiction of the court that suit be instituted within the time stipulated. *Finn* v. *United States*, 123 U. S. 227. *United States* v. *Babcock*, 250 U. S. 328, 332.

In the applicable statutes whereby the United States consented to be sued by the Seminoles, a time limit was prescribed. Section 2 of the Act of May 20, 1924, c. 162, 43 Stat. 133, provided that:

> Any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of approval of this Act, and such suit shall make the Seminole Nation party plaintiff and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claim or claims * * *.

Subsequently, Act of Feb. 19, 1929, c. 268, 45 Stat. 1229, provided that "the time within which suits may be instituted * * * shall be extended to June 30, 1930."

In our opinion, these statutes bar every claim which was not specifically, or by reasonable implication, included in a petition filed prior to July 1, 1930.

Section 2 of the Act of May 20, 1924, just quoted, stipulates that "any and all claims * * * shall be forever barred unless suit be instituted or petition filed as herein provided." Probably

no one would read this statute as providing that the filing of *any* petition by the Seminoles preserved *all* their claims. If, for example, they filed a petition specifically seeking recovery for the Government's failure to pay for the support of blacksmiths, and seeking nothing more, that would not give the court jurisdiction of a claim based on the Government's failure to erect a building. An absurd example of that sort shows that the statute must be construed as though it stipulated that "any and all claims shall be forever barred unless suit be instituted or petition filed *with respect to them* as herein provided."

The respondent apparently does not disagree with us thus far: i. e., that a petition presenting one specific claim does not preserve jurisdiction over another unrelated claim. But their counsel argues that this is not the situation at bar. He contends that the original petition filed in this case, the petition of February 24, 1930 (R. 1–3), does not merely present a specific claim, but requests a general accounting of all Seminole claims, which for convenience are divided into those before and others after the Curtis Act (Br. Opp. 12, 14–20). We submit that this construction of their petition is not warranted and that the pleading, instead of being a request for a general accounting, in fact states, and seeks recovery for, only one type of injury having four elements: (1) expenditures by the Government, (2) which were made after July

1, 1898, (3) in violation of a treaty or agreement, (4) from trust funds established by a treaty or agreement.

Before turning to the petition and examining it in detail it is important to observe two general considerations which should lead us to construe the pleading as specific rather than general.

In the first place, there is serious doubt whether, in the jurisdictional statute, Congress intended to authorize the Seminoles to request a general accounting. The first sentence of Section 2 of the Act of May 20, 1924, the applicable statute, declared that "any and all claims * * * shall be forever barred unless suit be instituted or petition filed *as herein provided.*" The second sentence then provided that "the petition shall be verified." Verification would hardly have been made a condition precedent to a petition if all that the Seminoles were required to do was to ask for a general accounting. The sort of claims which Congress envisaged and authorized the Court of Claims to hear were specific statements of injuries suffered.

In the second place, it would be a departure from its usual practice for the Court of Claims to entertain any general petition for an accounting. As this Court has said, *Merritt* v. *United States,* 267 U. S. 338, 341:

> The practice of the Court of Claims, while liberal, does not allow a general statement of claim in analogy to the common counts. It requires a plain, concise statement of the

facts relied upon. See Rule 15, Court of Claims. The petition may not be so general as to leave the defendant in doubt as to what must be met.

Bearing in mind these general considerations, we are now free to examine in detail the petition of February 24, 1930 (R. 1–3), upon which it is conceded that the jurisdiction of the Court of Claims rests.

In separate numbered paragraphs this petition (*I*) referred to the jurisdictional statute, (*II*) recited "that at all times mentioned herein, and for many years prior thereto, the Seminole Nation was the owner of large trust funds, held in trust by the defendant [the Government] for its use and benefit, and that there existed various treaties and agreements between said plaintiff and defendant whereby said trust funds were to be managed and invested by defendant, and the interest thereon paid over to the National Treasurer of plaintiff" (R. 1); (*III*) noted that "after the passage of" the Curtis Act of June 28, 1898, the Government "impounded all of the funds of plaintiff, refused to further pay them over to plaintiff's National Treasurer, and proceeded to disburse them for various purposes" (R. 1); (*IV*) quoted Section 19 of the Curtis Act; (*V*) charged that other subsequent statutes were irrelevant; (*VI*) stated "that from July 1st, 1898, until the present time, defendant, * * * in violation of the rights of plaintiff under its various treaties and agreements with

defendant, and without authority of Congress, has spent large sums of the trust funds of plaintiff" (R. 2); (*VII*) quoted R. S., Sec. 2097; and (*VIII*) prayed:

> That the defendant has thus spent, in violation of law, a large amount of the trust funds of plaintiff. That the exact amount of such expenditure will be shown by the books and records of defendant, and that such knowledge is in the possession of defendant, and not of plaintiff.
>
> Wherefore, plaintiff prays that defendant be required to file in this cause a statement showing its expenditures of plaintiff's funds during said period, the purposes for and dates when such expenditures were made, and the authority of law, if any, which authorized defendant to make such expenditures; that, if necessary thereafter, plaintiff be permitted to amend this petition, and that plaintiff have judgment against the defendant in such sum or sums as appear to this court to be expended without authority of law, with interest at six per centum per annum from the date of the expenditure of the several items constituting said sum.

It is our contention that the foregoing petition is specific and relatively narrow in its statement of the plaintiff's *rights* and the *injuries* which the defendant is alleged to have inflicted.

The only rights which the petition states are said to arise out of trust funds. This is made clear in paragraphs II, VI, and VIII. Nowhere does

the plaintiff set forth a right to a general obligation of the Government such as one arising out of a contract or miscellaneous treaty provisions. Moreover, the only trusts with respect to which rights are claimed are trusts arising out of treaties or agreements. This limitation to a particular type of trust is stated in lines 4–5 of paragraph II and lines 2–3 of paragraph VI. Each time a trust is mentioned the language used is clearly conjunctive, not disjunctive. Thus in paragraph II (R. 1) after trust funds were mentioned, it was emphasized that "there existed various treaties and agreements between said plaintiff and defendant whereby said trust funds were to be managed and invested by defendant." And in paragraph VI (R. 2) the Government's conduct was alleged to be not merely "in violation of its duty as trustee of the funds of plaintiff" but at the same time (not alternatively) "in violation of the rights of plaintiff under its various treaties and agreements." And these references limiting the trusts to those created under treaties or agreements are not broadened by the less specific language of paragraphs III, IV, V, or VIII, since those paragraphs do not purport to state the source of the plaintiff's right or title, but merely deal with action of the defendant (par. III and VIII) or of Congress (par. IV and V).

The wrong which the defendant is stated to have inflicted is likewise circumscribed. First, it is clear that the only wrong alleged is an unlawful expenditure. This is forcibly brought out in para-

graphs VI and VIII and recognized in paragraphs III, IV, V, and VII. Second, the only way in which the expenditure is alleged to be unlawful is that it was "in violation of its [the Government's] duty as trustee of the funds of plaintiff, in violation of the rights of plaintiff under its various treaties and agreements with defendant." (R. 2, par. VI.) The respondent suggests (Br. Opp. 10) that paragraph VII was intended to assert that the expenditure was also in violation of R. S., Sec. 2097. But that paragraph merely quotes the statute and does not allege a violation of its terms. Like paragraph IV and like the phrase "without authority of Congress", in line 4 of paragraph VI, paragraph VII was included to forestall a defense, not to lay a foundation for a cause of action. If the action were in equity, this part of the petition would be called the "charging part", not the "stating part." Daniell's *Chancery Pleading and Practice* (6th Am. Ed.) *372–374. Indeed, nowhere in the petition does the plaintiff state that the defendant violated any statute,[7] not even in the

[7] Even in paragraph III the plaintiff does not allege that the Government's action was in violation of a statute or was otherwise wrongful. Moreover, if the language of this paragraph could be tortured to spell out complaint against an injury, the injury alleged would be that the "defendant impounded all of the funds of plaintiff" and "refused to further pay them over to plaintiff's National Treasurer." (R. 1.) Such an allegation would be the exact converse of the grievance which the respondent now urges, and for which recovery was allowed by the lower court. See pages 35–37, *infra*.

prayer.[8] Finally, all the unlawful conduct of the defendant is alleged to have occurred since July 1, 1898. This limitation is prescribed [8a] in paragraph VI by the phrase "from July 1st, 1898, until the present time" and is recognized by the request for an accounting in paragraph VIII which covers the "said period" from July 1st, 1898 (R. 2, par. VIII, 1, 8). In attempting to overcome this limitation respondent (Br. Opp. p. 10) has drawn attention to paragraph II, but that paragraph merely states the origin and long duration of the plaintiff's right. It does not purport to state any injury by the defendant. It does not enlarge the period of time covered by the claim, for the claim begins when the right of the plaintiff was alleged to be invaded by the defendant.

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[8] The clauses in the concluding paragraph which contains the prayer do no more than summarize and ask relief on account of wrongs theretofore stated. They do not add original allegations. This is true of the clause in lines 1–2 of paragraph VIII, "That the defendant has *thus* spent, in violation of law, a large amount of the trust funds of plaintiff", and also of the clause, in lines 11–13, asking "that plaintiff have judgment against the defendant in such sum or sums as appear to this court to be expended without authority of law."

[8a] For the purpose of testing the sufficiency of a pleading, averments of time and place are material. *Rules of the Court of Claims* (1916) Rule 15 (2) provides that the petition must set forth "a plain, concise statement of facts, giving venue and *date* * * *." Compare *Ryland v. Hollinger*, 117 Fed. 216, 219 (C. C. A.); *Preliminary Draft of Rules of Court Procedure*, prepared by Advisory Committee of this Court. (May, 1936) p. 26, l. 55–58.

If we are correct in our contention that the petition is not a general request for an accounting of all obligations, but for an accounting of expenditures made from trust funds after July 1, 1898, in violation of a treaty, then we submit that it is of no consequence that the petition also included a prayer that "if necessary thereafter, plaintiff be permitted to amend this petition" (R. 2, par. VIII, 1, 10–11). The petition points to one specific claim. The reservation of the right to amend may have the effect of permitting the restatement or clarification of that particular claim. But it can hardly allow petitions to nullify the specific limitation of the jurisdictional Act by presenting, after June 30, 1930, new claims which are entirely different, and have nothing in common but the names of the parties.

The cause of action, as it was outlined in the original petition, bears no resemblance to the following causes of action or claims set forth in the amended petition, filed September 19, 1934 (R. 3–8), four years after the time for invoking the jurisdiction of the Court of Claims had lapsed, but nonetheless adjudicated by that court:

(1) The claim that the Government did not completely perform its promise under Article VIII of the Treaty of August 7, 1856, to pay annually for ten years $3,000 for schools, $2,000 for agricultural assistance, and $2,200 for blacksmiths (R.

16–18; Opinion, Item 1. See pages 14–15, *supra*). This claim, upon which a judgment of $61,563.42 was entered against the Government (R. 18), is not based upon an obligation connected with a trust fund, and the dereliction, if any, occurred before 1898.

(2) The claim that the Government did not completely perform its promise under Article IX of the Treaty of August 7, 1856, to spend $20,000 for improvements (R. 20; Opinion, Item 4. See page 15, *supra*). This cause of action, upon which a judgment of $1.790 was entered against the Government (R. 20), is not connected with a trust fund, and antedates 1898.

(3) The claim that the Government did not completely perform its promise under Article VI of the Treaty of March 21, 1866, to erect agency buildings (R. 22–23; Opinion, Item 7. See pages 15–16, *supra*). This cause of action, upon which a judgment of $9.068.24 was entered against the Government (R. 23), is not connected with a trust fund and antedates 1898.

(4) The claim that in 1867–1874, 1876, 1879, and 1907–1909 the Government made underpayments of interest on the $500,000 trust established by the Treaty of 1856 (R. 19–20; Opinion, Item 3. See pages 10–11, *supra*). Upon this claim of underpayment a judgment of $154,551.28 was entered against the Government (R. 20). But a claim for underpayment is not the claim originally made.

The original claim was for wrongful *expenditures* and disbursements. This is stated most clearly in paragraphs VI and VIII of the petition; but it is also recognized in paragraphs III, IV, V, and VII. Nowhere, expressly or by implication, does the petition complain of an underpayment. And an underpayment is legally very different from a wrongful expenditure: Before the union of law and equity, the former was "an *action at law* against the trustee to enforce payment"; the latter *a suit in equity* "to compel the trustee to redress a breach of trust."[8b] And as another item in this suit illustrates, the damages differ according to which theory is adopted.[8c] Moreover, most of these underpayments are alleged to have occurred prior to 1898.

(5) The claim that from 1867 to 1874, inclusive, and again in 1907, the Government made underpayments of interest on the $70,000 trust established by the Treaty of 1866 (R. 20–22; Opinion, Item 5. See pages 11–12, *supra*). This claim of underpayment, upon which a judgment of $3,097.20 plus $750 was entered against the Government (R. 22), likewise is not similar to a claim

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[8b] American Law Institute, *Restatement of the Law of Trusts*, Sections 198, 199. Compare *Norton* v. *Ray*, 139 Mass. 230, 232.

[8c] If, for example, in the Curtis Act claim recovery had been sought to enforce payment the damages would have been $879,750. But the plaintiff sued instead for a breach of trust through a wrongful expenditure, and recovered only $864,702.58. (R. 26.)

for wrongful expenditure; and, again, most of the underpayments are alleged to have occurred prior to 1898.

(6) The claim that from 1875 to 1898 the Government paid the interest on the $70,000 trust fund established by the Treaty of 1866 to the Seminole tribal treasurer instead of for the support of the Seminole schools (R. 20–22; Opinion, Item 5. See pages 11–12, *supra*). This claim, upon which a judgment of $57,500 was entered against the Government (R. 22), is based on diversions prior to July 1, 1898.

(7) The claim that from 1899 through the first half of the fiscal year 1907, the Government, in violation of Section 19 of the Curtis Act, paid to the Seminole tribal treasurer the annual interest on the three trust funds established by the Treaty of 1856, the Treaty of 1866, and the Indian Appropriation Act of 1890 (R. 23–26; Opinion, Item 8. See pages 9–10, *supra*). Upon this claim a judgment of $864,702.58 was entered against the Government (R. 26).

This entire seventh claim, *as well as the preceding sixth claim,* are, in our opinion, the exact antithesis of, and not included within or consonant with, the cause of action embodied in the original petition of February 24, 1930. As we have already pointed out, in the original petition the plaintiff was complaining solely of a "violation of the rights of plaintiff under its various treaties and agree-

ments" (R. 2, par. VI). Nowhere is complaint made that the Curtis Act or any other statute was violated. The plaintiff merely by way of anticipatory defense pointed out that "the only authority given by said Act" (R. 1, par. IV) and every "subsequent act" (R. 2, par. V) was irrelevant; and that the expenditures were "without authority of Congress." See page 30, *supra*. In short, it may fairly be said that whereas the original petition complains that the Government committed a breach of trust because it did *not* pay the sums to the tribal treasurer[9] but disbursed them for other purposes (R. 1–2, par. II, III, and VI); the amended petition complained (R. 6, par. VIII), and the lower court entered a judgment of $864,-702.58 (R. 26), on the ground that the Government violated a statute because it *did* pay the sums to the tribal treasurer instead of disbursing them through its own agents.

Even if the entire seventh claim is not outside the scope of the original petition, clearly so much of it as is based on the $1,500,000 trust, heretofore called the third trust, see page 7, *supra*, is beyond its scope and is new matter. The original petition

[9] See particularly paragraph III stating: "That from and after the passage of a certain Act of Congress, approved June 28th, 1898 (30 Stat. 495), defendant impounded all of the funds of plaintiff, refused to further pay them over to plaintiff's National Treasurer, and proceeded to disburse them for various purposes as shall hereinafter appear" (R. 1).

set forth only such rights of the plaintiff as were based on treaties and agreements. Every time a trust fund was mentioned it was said to be connected with a treaty or agreement.[10] The plaintiff at no place alleged a right based upon statute, or a right to a trust fund created by statute.[11] Therefore the petition did not go so far as to include the violation of rights arising out of the $1,500,000 trust, which had no connection with a treaty or agreement and existed solely[12] as a result of Section 12 of the Indian Appropriation Act for the fiscal year 1890, Act of March 2, 1889, c. 412, 25 Stat. 980, 1004.

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[10] Thus in paragraph II (R. 1) after trust funds were mentioned, it was emphasized that "there existed various treaties and agreements between said plaintiff and defendant whereby said trust funds were to be managed and invested by defendant." And in paragraph VI (R. 2) the Government's conduct was alleged to be not merely "in violation of its duty as trustee of the funds of plaintiff" but at the same time (not alternatively) "in violation of the rights of plaintiff under its various treaties and agreements."

[11] The respondent concedes in his brief opposing our petition for certiorari (Br. Opp. 13) that so much of the seventh claim as is based on the $1,500,000 trust "has no connection with Paragraph II of the original petition." Respondent then contends that the item "is covered by paragraphs III to VI, inclusive." But those paragraphs do not set forth rights of the plaintiff: paragraphs III and VI deal with conduct of the defendant, and paragraphs IV and V merely contain anticipatory defenses.

[12] The Court of Claims neglected to make a finding with respect to the establishment of this trust, but its opinion recognizes its statutory origin (R. 24).

We submit that the foregoing analysis shows that all but one[13] of the claims now under review were not presented to the lower court in the original petition, the only pleading filed within the jurisdictional period.

In allowing these claims to be incorporated by an amendment made after June 30, 1930, the lower court did not merely violate the ordinary canon that an amendment will not be permitted to introduce a new cause of action after the statute of limitations has run (*N. & G. Taylor Co., Inc.* v. *Anderson,* 275 U. S. 431, 438–439; *Baltimore & Ohio S. W. R. Co.* v. *Carroll,* 280 U. S. 491, 494; *United States* v. *Henry Prentiss & Co.,* 288 U. S. 73, 84; see *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, 68–69); it also entertained a suit against the United States on terms to which the Government never consented, *Finn* v. *United States,* 123 U. S. 227. This error went to the jurisdiction of the Court of Claims and can be raised at any stage[14] of the proceedings. *Matson Navigation Co.*

[13] We do not deny that the Court of Claims had jurisdiction over the claim founded on disbursements from 1920 to 1930, inclusive, from the fourth trust fund of $500,000 set apart by the Seminole Agreement of 1897. See pages 8–9, *supra.* However, we contend that the judgment of $154,455.30 (R. 27) based thereon is erroneous. See pages 68–73, *infra.*

[14] The Government raised the jurisdictional question and made substantially the foregoing argument in the Court of Claims on the second petition for rehearing (R. 30). Thus the statement of the lower court that its jurisdiction was

v. *United States,* 284 U. S. 352, 359. Cf. *United States* v. *Martinez,* 195 U. S. 469.

II

THE GOVERNMENT IS NOT LIABLE TO THE SEMINOLES FOR THE $864,702.58 WHICH IT PAID OUT OF SEMINOLE TRUST FUNDS TO THE TRIBAL TREASURER FROM THE FISCAL YEAR 1899 THROUGH THE FIRST HALF OF THE FISCAL YEAR 1907.

The Court of Claims found that out of the income of the first three [15] Seminole trusts described at pages 6–8, *supra,* the Government, from the fiscal year 1899 through the first half of the fiscal year 1907, paid to the Seminole tribal treasurer $864,702.58 (R. 14, Fdg. XII). In Item 8 of its opinion (R. 23–26) the lower court considered these payments and held that in making them the Government violated Section 19 of the Curtis Act, which provides:

> That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof *for disbursement,* but payments of all sums to *members of said tribes* shall be made under

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not questioned (R. 16), though accurate when made, does not represent the situation when the case was last reconsidered by that tribunal.

[15] Our petition for certiorari (Pet. 5–6, 22–23) erroneously assumed that the fourth trust was also involved in the lower court's discussion of the Curtis Act (R. 23–26. Opinion, Item 8). See the correction in the respondent's brief in opposition (Br. Opp. 27–28).

> direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation. [Italics added.]

Thereupon the court entered judgment against the Government for said $864,702.58 (R. 26).

We contend that no recovery should have been allowed on this eighth item for these three reasons, each of which is advanced as a separate defense:

A. The payments did not violate Section 19 of the Curtis Act because Section 19 does not apply to the type of trusts involved in Item 8.

B. If the payments were merely in violation of Section 19 of the Curtis Act the Seminoles have no standing to complain of that violation since the section gave to them no right of action.

C. If the payments were in violation of Section 19 of the Curtis Act, the Seminoles are estopped to complain inasmuch as the payments were made at their request and with their consent.

A. SECTION 19 OF THE CURTIS ACT DOES NOT APPLY TO THE TYPE OF TRUSTS INVOLVED IN ITEM 8

In our opinion, Section 19 of the Curtis Act relates exclusively to the Government's method of paying amounts due to individual Indians, and does not apply to trusts like those at bar which, in 1898, were being held for educational and tribal purposes. This narrow construction is supported

by the language of the statute, its legislative history and its fundamental objective.

The opening clause of the section speaks of a "payment of any moneys * * * to any of the tribal governments or to any officer thereof *for disbursement.*" This language is restricted to those payments which are made to a tribal government or officer as an agent "for disbursement." The phrase "on any account whatever" which appears in this clause does not broaden the restriction but merely recognizes that every payment for disbursement is included, no matter what may be the contract which gave rise to the obligation or the account to which it is charged. The restriction of the first clause is expressly carried over to and rephrased in the second clause. It is there recognized that the first clause has blocked the then customary method of making "payments of all sums to *members of said tribes*", and that a way out of the impasse must be found. Accordingly, the second clause directs that "payments of all sums to *members of said tribes* shall be made under direction of the Secretary of the Interior by an officer appointed by him." The remaining clauses of the section deal with a problem arising out of a particular category of payments for disbursement to members of said tribes; that is, the category embracing payments in which disbursement is intended to be on an equality among all the Seminoles, otherwise known as "per capita

payments." And these clauses provide that such "per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

Any other way of reading Section 19 creates more difficulties than it solves and reaches a result which is of no practical benefit to the respondent. Let us, for the sake of argument, suppose that the first clause is broad enough for application not merely to payments for disbursement, but to any and every payment to the tribal governments or to any officer thereof. If this hypothesis be taken, then it follows that all payments of both types are absolutely prohibited except as otherwise provided by special rules in later clauses of Section 19: such is the plain consequence of the unambiguous words of the first clause which stipulate that "*no* payment * * * shall hereafter be made." The special rules which create exceptions to this general ban and which permit payment in certain ways come in the succeeding second and third clauses and relate *only* to "payments * * * to members of said tribes" and to "per capita payments." And so it follows that *if the respondent were correct in arguing that Section 19 had the slightest application to payments other than those for disbursement to members of the Seminole Tribe, then its sole application would be negative, that is, to forbid absolutely and without qualification, such*

payments. Thus, respondent's construction at once ends any cause of action based on the Curtis Act unless it be a cause of action growing out of a promise to make payments to individual members of the Seminole tribe.

The limitation of Section 19 to payments for disbursement is required not only by its language but also by its legislative history. Section 19 of the bill which became the Curtis Act, H. R. 8581, 55th Congress (Cong. Rec., 55th Cong., 2nd Sess., Vol. 31, Part IV, Page 3869, April 14, 1898), provided in its original draft:

> That no payment of any moneys on any account whatever shall hereafter be made to any of the tribal governments or to any officer thereof for disbursement, but payments *of all expenses incurred in transacting their business* and of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation. [Italics added.]

The opening and final clauses of this draft were virtually the same as the present statute. However, the second clause of the original draft covered not merely "payments * * * of all sums to members of said tribes" but also "payments of all expenses incurred in transacting their [i. e.,

the tribal governments'] business." In striking this latter phrase from the bill as finally enacted, Congress showed that its intent in the first clause and in the section as a whole was merely to change the method of making payments "for disbursement" "to members of said tribes" including "per capita payments." It deliberately left untouched the method of paying sums due to the tribe in its corporate and quasi-sovereign capacity.

Moreover, this redraft of Section 19 carried out the fundamental objective of the legislation, that is, the safeguarding of the rights of individual Indians. The original draft, and respondent's argument, would go farther than this and would alter not merely the *method* of paying money due to individual Indians, but also the *purpose* of the trust funds. Cf. *Sac and Fox Indians of the Mississippi in Iowa* v. *Sac and Fox Indians of the Mississippi in Oklahoma, and the United States*, 220 U. S. 481, 486. As is explained more fully in the succeeding paragraphs, the respondent's contention would give to individual Indians the benefit of funds intended for specific educational and tribal purposes.

Inasmuch as Section 19 relates exclusively to the Government's method of paying amounts due to individual Indians, it has no application to the three trusts with which we are now concerned.

The trust to which Section 19 of the Curtis Act is most obviously irrelevant is the second trust, amounting to $70,000, established by Article III

of the Treaty of March 21, 1866, which provided that—

> fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools; the remainder of the seventy thousand dollars, being twenty thousand dollars, shall remain a permanent fund, the interest of which shall be paid annually for the support of the Seminole government; * * *

This treaty states, without the slightest ambiguity, that the purposes of this trust were to give $2,500 annually for "the support of schools" and $1,000 annually "for the support of the Seminole government." It would be a perversion of the purposes of this trust to distribute the interest to individual Indians. Congress never intended to alter or abandon its educational program. In the Curtis Act it merely intended to assure the "members of said tribes" that they would receive the money to which they already had a right; not to give them a right to money dedicated to special purposes.

Moreover, if, *arguendo,* we assume that Congress used in the Curtis Act language which was broad enough to cover this second trust and convert it into a trust for distribution, Congress in later legislation superseded that general command with specific directions that the interest from this trust should be reconverted and applied as before, $2,500

for "the support of schools" and $1,000 "for the support of the Seminole government." In each of the appropriation acts[16] for the period of this claim (from the fiscal year 1899 through the first half of the fiscal year 1907) an appropriation in substantially the following terms was made:

> For interest on fifty thousand dollars, at the rate of five per centum per annum, to be paid annually for the support of schools, as per third article of treaty of March twenty-first, eighteen hundred and sixty-six, two thousand five hundred dollars;
>
> For interest on twenty thousand dollars, at the rate of five per centum per annum, to be paid annually for the support of the Seminole government, as per same article, same treaty, one thousand dollars * * *

The third trust is also outside the scope of Section 19 of the Curtis Act. This trust of $1,500,000 was established by Section 12 of the Act of March 2, 1889, c. 412, 25 Stat. 980, 1004 (which may be conveniently referred to as the Indian Appropriation Act of 1890) in the following words:

> SEC. 12. That the sum of one million nine hundred and twelve thousand nine hundred

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[16] Act of July 1, 1898, c. 545, 30 Stat. 571, 580; Act of March 1, 1899, c. 324, 30 Stat. 924, 933; Act of May 31, 1900, c. 598, 31 Stat. 221, 230; Act of March 3, 1901, c. 832, 31 Stat. 1058, 1068; Act of May 27, 1902, c. 888, 32 Stat. 245, 253; Act of March 3, 1903, c. 994, 32 Stat. 982, 989; Act of April 21, 1904, c. 1402, 33 Stat. 189, 199; Act of March 3, 1905, c. 1479, 33 Stat. 1048, 1054; Act of June 21, 1906, c. 3504, 34 Stat. 325, 344.

and forty-two dollars and two cents be, and the same hereby is, appropriated, out of any money in the Treasury not otherwise appropriated, to pay in full the Seminole Nation of Indians for all the right, title, interest, and claim which said nation of Indians may have in and to certain lands ceded by article three of the treaty between the United States and said nation of Indians, which was concluded June fourteenth, eighteen hundred and sixty-six, and proclaimed August sixteenth, eighteen hundred and sixty-six, and which land was then estimated to contain two million one hundred and sixty-nine thousand and eighty acres, but which is now, after survey, ascertained to contain two million thirty-seven thousand four hundred and fourteen and sixty-two hundredths acres, said sum of money to be paid as follows: *One million five hundred thousand dollars to remain in the Treasury of the United States to the credit of said nation of Indians and to bear interest at the rate of five per centum per annum from July first, eighteen hundred and eighty-nine, said interest to be paid semi-annually to the treasurer of said nation,* and the sum of four hundred and twelve thousand nine hundred and forty-two dollars and twenty cents, to be paid to such person or persons as shall be duly authorized by the laws of said nation to receive the same, at such times and in such sums as shall be directed and required by

> the legislative authority of said nation, to be immediately available; * * *. [Italics added.]

This section deals with two funds in two different ways. It directs that the interest on the $1,500,000 fund "be paid semi-annually to the treasurer of said nation"; and that the principal of the $412,942.50 fund "be paid to such person or persons as shall be duly authorized by the laws of said nation to receive the same." We do not deny that payments from the second fund are for disbursement to members of the Seminole tribe. On the other hand, we do contend, and the contrasting language of Section 12 emphasizes our contention, that payments for the first fund are for the tribal treasurer. He receives it not as a Federal agent for disbursement according to some prearranged plan, but as a tribal officer responsible only to the Seminole nation which, since the trust is "to the credit of said nation", is itself the cestui que trust.

Any attempt to apply the Curtis Act to this trust would result in changing the beneficiary and would leave the Seminole nation virtually without funds. Congress did not intend to strip the Seminoles of their tribal government and their tribal funds. It is true that *other* tribal governments were corrupt (R. 24–25) and about to be dismantled; but the Seminole government was not in their category. Only three days after the enactment of the Curtis

Act Congress recognized its integrity. Act to Ratify the Agreement of December 16, 1897, between the Dawes Commission and the Seminole Nation, Act of July 1, 1898, c. 542, 30 Stat. 567. In that agreement Congress did nothing to impair its earlier promise that the "Seminoles shall be secured in the unrestricted right of self-government." Article XV of the Treaty of August 7, 1856, 11 Stat. 699. Indeed, it was not until Section 8 of the Indian Appropriation Act of 1904, Act of March 3, 1903, c. 994, 32 Stat. 982, 1008, that Congress provided that "the tribal government of the Seminole nation shall not continue longer than May fourth, nineteen hundred and six."

It was in recognition of a Congressional intent to preserve the Seminole tribal government and to allow it to retain control over its own funds that L. P. Mitchell, Assistant Comptroller, ruled that the Curtis Act did not apply to trust funds such as the one we are now considering. His opinion to the Secretary of the Interior, dated August 23, 1898, Appendix, pp. 38–39, concludes:

> From the presentation of the case as it appears in your letter it seems to me clear that it was not the intention of the agreement, nor does that instrument in fact deprive the Seminole tribal government of its privilege and duty of disbursing its own funds *prior to the time of the extinguishment of its tribal government,* which extinguishment is evidently contemplated in the

> near future; therefore I am of opinion that the moneys due these Indians can be turned over to the tribal authorities for disbursement until such time as the tribal government shall be extinguished.

This contemporaneous ruling as to disbursements under these trust funds deserves particular respect since it was given by an official whose decision was authorized to "govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement." Section 8 of the Dockery Act, Act of July 31, 1894, c. 174, 28 Stat. 162, 208.

We submit that there is nothing contrary to our contention or to Comptroller Mitchell's decision in the subsequently withdrawn opinion of Assistant Attorney General Van Devanter, dated July 12, 1898, addressed to the Secretary of the Interior, Appendix, pp. 46–50, or in the opinion of Attorney General Bonaparte, 26 Op. Atty. Gen. 340.

Assistant Attorney General Van Devanter's opinion seems to be concerned particularly with a fund to be derived from coal, gas, and oil royalties mentioned in the Seminole Agreement of 1897, Act of July 1, 1898, c. 542, 30 Stat. 567. It was expressly provided in that Agreement that said fund "shall be paid per capita to the members of said tribe in three equal installments." The Secretary of the Interior asked broadly whether Section 19 of the Curtis Act applied to the Seminole nation. But what he and Assistant Attorney Gen-

eral Van Devanter seem to have had in mind was the narrow issue whether, in distributing the royalty fund, payment should be made through the tribal officers or through appointees of the Secretary of the Interior. Assistant Attorney General Van Devanter answered that the Curtis Act applied to the Seminole Nation, and that in any event, so far as this royalty fund was concerned, its specific terms directed, in much the same words as the Curtis Act, that payment should be through appointees of the Secretary of the Interior.

We do not disagree with the result reached by Assistant Attorney General Van Devanter with respect to the particular royalty trust which he was considering. But we contend that he did not purport to rule upon, and his reasoning does not apply to, a trust like the one for $1,500,000 which we are now considering, which was established to the credit of the Seminole nation and which provides that the interest shall "be paid semi-annually to the treasurer of said nation."

The opinion of Attorney General Bonaparte, dated August 19, 1907, 26 Op. Atty. Gen. 340, is likewise irrelevant. He was asked by the Secretary of the Interior how the payment of money to the Seminole tribe after the fiscal year 1907 was affected not by the Curtis Act but by the Act of April 26, 1906, c. 1876, 34 Stat. 137. Section 11 of that Act, passed after the dissolution of the Seminole tribal government, specifically provided:

> That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him * * *.

The Attorney General ruled that after January 1, 1907, payments should not be made to the tribal treasurer. But that ruling has no application here inasmuch as the statute there considered is subsequent to the period (from the beginning of the fiscal year 1899 through the first half of the fiscal year 1907) now under consideration, and inasmuch as that statute covered "all revenues of whatever character accruing to the * * * Seminole tribes."

There remains for consideration the trust which we have numbered one; see page 6, *supra*. By Article VIII of the Treaty of August 7, 1856, 11 Stat. 699, 702, the Government promised the Seminoles:

> to invest for them the sum of two hundred and fifty thousand dollars, at five percent per annum, the interest to be regularly paid over to them *per capita* as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the

> two sums so invested, shall constitute a fund belonging to the united tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them *per capita* as an annuity; * * *

Thus the trust originally provided that the interest should be paid per capita for distribution to members of the Seminole tribe. However, twenty-four years before the Curtis Act the character and purposes of this interest payment were by agreement changed into a payment for the benefit of the Seminole nation itself, like the $1,500,000 trust we have just considered. In the Act of April 15, 1874, c. 97, 18 Stat. 29, Congress provided:

> That the Commissioner of Indian Affairs, with the sanction of the Secretary of the Interior and the President of the United States, in distributing and paying annuities, interest, or other moneys now due or hereafter to become due to the Seminole tribe of Indians under the provisions of the eighth article of the treaty between the Creek and Seminole Indians and the United States, concluded August seventh, eighteen hundred and fifty-six, shall be authorized to expend the same for such objects as will best promote the comfort, civilization, and improvement of the Seminole Indians, or in his discretion, with the sanction of the Secretary and the President aforesaid, shall be authorized to pay such annuities or any part thereof into the treasury of the Seminole nation to be used as the council of the same

> shall provide, instead of paying the same per capita according to the terms of said treaty: *Provided,* That said agreement shall provide that the sum of five thousand dollars shall be annually appropriated out of said annuity to the school fund of said tribe: *And provided further,* That the consent of said tribe to such expenditures and payment shall be first obtained.

This statute is not a mandate which *ipso facto* changes the annuities from per capita disbursements to payments to the nation's tribal treasurer. It merely authorizes the Commissioner of Indian Affairs, with the sanction of the Secretary of the Interior and the President, to make an *offer* "to pay such annuities or any part thereof into the treasury of the Seminole nation." The offer is to become effective only if "the consent of said tribe to such expenditures and payment shall be first obtained."

This offer was made and accepted in the manner "authorized by the Act of April 15, 1874" (R. 19). By the act of the Seminole legislature (also called council) of April 2, 1879, the tribe consented that all annuities then due or thereafter to become due to it under the provision of the eighth article of the treaty of August 7, 1856, should be paid into the Treasury of the Seminole nation to be used as the council of the same should provide (Opinion of Comptroller Mitchell, dated Aug. 23, 1898, Appendix, p. 27). Thus there was a consensual and,

so far as the Seminoles were concerned, a binding conversion of the interest due on the trust from payments for the benefit of individual Indians to payments for the benefit of the tribe.

As in the case of the $1,500,000 trust, payments of interest on this $500,000, or first trust, were, from 1879 on, payments to the tribal treasurer as agent of his government, not as Federal disbursing officer. Therefore, when the Curtis Act was enacted, it did not affect this trust for the reasons already advanced in our discussion of the $1,500,000 trust; pages 48–52, *supra*. To apply the Act to this trust would be to do more than affect the *method* of payment; it would, without the consent of the Seminoles, change the *purposes* of the payment from those mutually agreed upon in 1879.

Our contention that Section 19 of the Curtis Act applies to none of the three Seminole trusts is in accordance not merely with the language of the section, the legislative history of the statute, and the purposes of the trusts, but with an administrative construction that had been specifically drawn to the attention of Congress. We have already noted the August 16, 1898, ruling of Comptroller Mitchell, and its peculiar authority under Section 8 of the Dockery Act. See pages 49–50, *supra*. The effect of this ruling was not passed over in silence. In the Annual Reports of the Department of the

Interior for the Fiscal Year ended June 30, 1899, 56th Cong., 1st sess., House Doc. No. 5, Indian Affairs, Part I, p. 197, the Secretary of the Interior transmitted to Congress the report of United States Indian Agent J. Blair Shoenfelt pointing out that—

> By reason of this treaty [the Seminole Agreement of 1897], which was afterwards ratified by Congress, the Seminoles are not under the provisions of the Curtis Act, and the Indian agent does not receive or disburse any of their moneys, it being done by the tribal officers * * *

Two years later, a like report of the same agent, transmitted to Congress as part of the Annual Reports of the Department of the Interior for the fiscal year ended June 30, 1901, 57th Cong., 1st sess., House Doc. No. 5, Indian Affairs, Part I, p. 231, noted that

> By reason of this agreement, which was afterwards ratified by Congress, the Seminoles are not under the provisions of the act of Congress of June 28, 1898, and the Indian agent does not receive or disburse any of their moneys, it being done by tribal officers.

Again, the next year, the report of the same agent indicated that "no revenues or royalties of any character have been collected by me for the benefit of the Seminole Nation during the fiscal year ended June 30, 1902." Annual Reports of the Department of the Interior for the fiscal year ended

June 30, 1902, 57th Cong., 2nd sess., House Doc. No. 5, Indian Affairs, Part I, p. 231.

In the face of these reports Congress continued to make appropriations for the payment of interest on the Seminole trusts. Act of July 1, 1898, c. 545, 30 Stat. 571, 580; Act of March 1, 1899, c. 324, 30 Stat. 924, 933; Act of May 31, 1900, c. 598, 31 Stat. 221, 230; Act of March 3, 1901, c. 832, 31 Stat. 1058, 1068; Act of May 27, 1902, c. 888, 32 Stat. 245, 253; Act of March 3, 1903, c. 994, 32 Stat. 982, 989; Act of April 21, 1904, c. 1402, 33 Stat. 189, 199; Act of March 3, 1905, c. 1479, 33 Stat. 1048, 1054; Act of June 21, 1906, c. 3504, 34 Stat. 325, 344. Thus an administrative construction of the Curtis Act, made thirty-eight years ago, was implicitly ratified by Congress more than thirty-five years ago, and has stood unchallenged until this law suit. We submit that the present case falls well within the doctrine stated by this Court in *Alaska Steamship Company* v. *United States,* 290 U. S. 256, 262:

> Courts are slow to disturb the settled administrative construction of a statute long and consistently adhered to * * *. That construction must be accepted and applied by the courts when, as in the present case, it has received Congressional approval, implicit in the annual appropriations over a period of thirty-five years, * * *

"The long established construction and practice of the Department [is] a fact entitled to much weight in a case like this." *Sac and Fox Indians of the*

Mississippi in Iowa v. *Sac and Fox Indians of the Mississippi in Oklahoma, and the United States*, 220 U. S. 481, 490.

It is almost unnecessary to add that the construction which the administrative authorities adopted and for which we contend does not render the section meaningless, as the respondent has argued. (Br. Opp. p. 21.) That law applied to several Indian tribes, and even if it affected no Seminole trusts, *non constat* that it did not affect the funds of other Indian tribes. Indeed, the reports of the Department of the Interior to which we have already referred abundantly illustrate that the section did have wide scope.

B. IF THE PAYMENTS WERE MERELY IN VIOLATION OF SECTION 19 OF THE CURTIS ACT, THE SEMINOLES HAVE NO STANDING TO COMPLAIN OF THAT VIOLATION SINCE THE SECTION GAVE TO THEM NO RIGHT OF ACTION

The respondent's precise contention is this: the payments made to the tribal treasurer from the three trusts (of 1856, 1866, and 1889) during the period from the beginning of the fiscal year 1899 through the first half of the fiscal year 1907 were in violation of *the rights of the Seminoles under Section 19 of the Curtis Act.*

Respondent does not, and could not well, contend that the payments were in violation of the rights of the Seminoles under any treaty, agreement, or other consensual transaction. To the Seminoles all that the Government had directly promised was this: with respect to the trust numbered one, at

least after the modification of 1879, to make annual payments of $25,000 into the treasury of the Seminole nation (18 Stat. 19); with respect to the trust numbered two, to make annual payments of $2,500 for the support of schools and $1,000 for the support of the Seminole government (14 Stat. 755, 756); and with respect to the trust numbered three, to make annual payments of $75,000 to the treasurer of the Seminole nation (25 Stat. 980, 1004). The right of the Seminoles under these consensual arrangements was to have the money paid to the tribe and the tribal officers. This method of payment was specifically stipulated with respect to the $25,000 annuity (after 1879), the $1,000 annuity, and the $75,000 annuity. No method of payment was prescribed with respect to the $2,500 annuity for the support of schools, but from 1899 through 1907 there could have been no *contractual* objection to making the payment to a tribal officer, since, during that period, the Seminole government was conducting its own schools.[17] And in accordance

[17] This statement is corroborated by the annual reports of the Department of the Interior during this period. For examples see the report for the fiscal year ended June 30, 1899, 56th Cong., 1st sess., House Doc. No. 5, Indian Affairs, Part I, p. 94; and the report for the fiscal year ended June 30, 1901, 57th Cong., 1st sess., House Doc. No. 5, Indian Affairs, Part I, p. 135.

[18] The Government should have paid $879,750. See page 10, *supra*. If there was a shortage of $14,797.42, as the present findings seem to indicate, it is not a shortage on account of which the Seminoles have advanced a claim. See footnote 8c on page 34, *supra*.

with the method of payment agreed upon, the Government from 1899 through 1907 is shown to have paid the tribal treasurer $864,702.58 [18] (R. 14, fdg. XII).

What respondent relies upon is not a violation of rights under treaties, agreements, or consensual undertakings but a violation of the Seminoles' supposed rights under Section 19 of the Curtis Act. We submit that Section 19 of the Curtis Act gave no right of action to the Seminoles but was merely a direction to agents of the United States, disobedience of which did not inflict a legal injury upon the Seminoles.

For this point we rely upon the controlling authority of *Sac and Fox Indians of the Mississippi in Iowa* v. *Sac and Fox Indians of the Mississippi in Oklahoma, and the United States,* 220 U. S. 481, which it is necessary to examine in detail. In that case it appeared that by the Treaty of October 11, 1842, 7 Stat. 596, the Government had promised "to pay annually to the Sacs and Foxes, an interest of five per centum upon the sum of eight hundred thousand dollars." The larger part of this tribe was together in the West, first in Kansas and later in Oklahoma. A band, however, settled in Iowa. Nonetheless, at the outset the Government paid the entire annuity to those who were on the reservation in the West. With this or other similar situations in mind, Congress provided in Section 3 of the Indian Appropriation Act, Act of Aug. 30, 1852, c. 103, 10 Stat. 41, 56:

> That no part of the appropriations herein made, or that may hereafter be made, for the benefit of any Indian, or tribe, or part of a tribe of Indians, shall be paid to any attorney or agent of such Indian, or tribe, or part of a tribe; but shall in every case, be paid directly to the Indian or Indians themselves to whom it shall be due, or to the tribe or part of a tribe *per capita,* unless the imperious interest of the Indian or Indians, or some treaty stipulation, shall require the payment to be made otherwise, under the direction of the President. * * *

Even after the passage of this statute, which, strikingly like Section 19 of the Curtis Act, directed that the officers of the United States make payment due to members of an Indian tribe "directly to the Indian or Indians themselves to whom it shall be due", the Government continued to make payment solely to those who were on the reservation. The Iowa band contended that this was a violation of the 1852 Act, of which they could complain, and accordingly filed their first claim on that basis. This Court denied the claim. Among other reasons for this result, Mr. Justice Holmes stated (220 U. S. 483–484):

> The act of 1852 gave no vested rights to individuals. It was not a grant to the Indians but a direction to agents of the United States, subject to other directions from the President. See *Wisconsin & Michigan Ry. Co.* v. *Powers,* 191 U. S. 379, 387. The Government did not deal with in-

> dividuals but with tribes. *Blackfeather* v. *United States,* 190 U. S. 368, 377. See *Fleming* v. *McCurtain,* 215 U. S. 56. The promises in the treaties under which the annuities were due were promises to the tribes.

It is plain that this quotation gives two reasons. One is that where money has been promised Indians and the promise has been performed in accordance with the agreement but in conflict with a statute giving "a direction to agents of the United States" how to make the disbursement, the Indians have no right to complain. This reason, which is the one upon which we rely, is buttressed by a relevant citation, *Wisconsin & Michigan Ry. Co.* v. *Powers,* 191 U. S. 379, 387. The second reason given in the quotation is that even if the conduct were a wrong to the Indians, the wrong was one of which only the tribe as a whole, and not a fraction of it, could complain. For this principle the citation given by Mr. Justice Holmes is *Blackfeather* v. *United States,* 190 U. S. 368, 377.

In the *Sac and Fox* case, the second claim advanced by the Iowa tribe was based on the Indian Appropriation Act of March 2, 1867, c. 173, 14 Stat. 492, 507. This act, after making the appropriation of the annuity due the Sac and Fox Indians, added a proviso—

> That the band of Sacs and Foxes of the Mississippi now in Tamar county, Iowa, shall be paid pro rata, according to their numbers, of

> the annuities, so long as they are peaceful and have the assent of the government of Iowa to reside in that State.

The Iowa band alleged that the Government failed to distribute in accordance with this proviso. In denying this claim this Court remarked (p. 485):

> This is subject to the same comment as the act of 1852 when relied upon as a foundation for individual rights under it.

The third claim presented by the Iowa band was founded on the Indian Appropriation Act of July 4, 1884, c. 180, 23 Stat. 76, 85, where, after an appropriation for interest payable under the treaty of 1842, it was provided that thereafter the Iowa Sacs and Foxes should have apportioned to them from treaty appropriations—

> their per capita proportion of the amount appropriated in this act; subject to provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: *And provided further,* That this shall apply only to original Sacs and Foxes now in Iowa to be ascertained by the Secretary of the Interior.

The Iowa band alleged that the apportionment had been improper and they had not received a fair share of the per capita payments. In rejecting this claim the Court made the following comment (p. 486), which amplifies the rule already stated:

> But here for a third time we are dealing with a statute, not with a treaty. There is no intimation of an intent to change the

> terms of the treaties by which the contracts were made not with individuals but with the tribes. *The statute neither changed nor conferred rights. It simply directed the Secretary of the Interior how the contracts of the United States should be performed.* [Italics added.]

Summarizing the Court's decision rejecting all three claims, Mr. Justice Holmes said (pp. 489–490):

> The treaty contracts on which the plaintiff's claims are founded gave rights only to the tribe, not to the members. It was an accepted and reasonable rule, especially in the days when Indians' wars still were possible and troublesome, that payments to the tribe should be made only at their reservation and to persons present there. The acts of 1852 and 1867 did not shift the treaty rights from the tribe to the members, create new rights or enlarge old ones. The payments up to 1884 had the sanction of statute. The act of 1884 no more created individual rights than did the acts of 1852 and 1867.

Here again the quotation announces two propositions, of which at least one is directly pertinent to our contention. The proposition on which we rely is that where money has been promised a tribe of Indians, and the promise has been performed in accordance with the agreement but in conflict with a statute giving instructions with respect to disbursements to officers of the United States, the Indians have not had their legal rights infringed.

This proposition and this quotation apply directly to the case at bar. The treaties here "gave rights only to the tribe, not to the members." These treaties, as mutually modified, were followed. The Curtis Act "did not shift the treaty rights from the tribe to the members, create new rights or enlarge old ones."

C. IF THE PAYMENTS WERE IN VIOLATION OF SECTION 19 OF THE CURTIS ACT, THE SEMINOLES ARE ESTOPPED TO COMPLAIN, INASMUCH AS THE PAYMENTS WERE MADE AT THEIR REQUEST AND WITH THEIR CONSENT

Even if the payments were in violation of Section 19 of the Curtis Act, and even if that statute gives to the Seminoles a right of action for its violation, the Seminoles are estopped to complain of the wrong, for the payments were made pursuant to a ruling which they requested and to which they consented.

When the Curtis Act was passed, a question immediately arose whether it applied to the Seminole trusts. The ruling which conclusively settled the question for internal administrative purposes was given by Comptroller Mitchell pursuant to the request of the Seminoles themselves. As the respondent has conceded in this Court (Br. Opp., p. 26), "the tribal officials and their counsel * * * opposed this opinion [of Assistant Attorney General Van Devanter] and had the question transferred to the comptroller." The opinion of the Comptroller (Appendix, page 33) recites:

> The Seminole tribe insist that all of said money can be, and should be, paid as heretofore, into the tribal treasury, to be applied and expended according to the laws of the tribe * * *.

Moreover, apart from their original request, the Seminoles, through their government representatives, acquiesced in and profited by (R. 14, fdg. XIII) the error, and they are now estopped to complain of it. *Magee* v. *United States,* 282 U. S. 432, 434. They are in the position of beneficiaries who cannot hold the trustee liable for actions with respect to trust property which they request him to take or to which they consent. *Duncan* v. *Jaudon,* 15 Wall. 165, 171–172; *Pope* v. *Farnsworth,* 146 Mass. 339, 344 (per Holmes, J.); *Lannin* v. *Buckley,* 256 Mass. 78, 82; *Matter of Niles,* 113 N. Y. 547, 559; Perry on *Trusts and Trustees* (7th ed.), § 849; American Law Institute, *Restatement of the Law of Trusts,* § 216.

III

THE GOVERNMENT IS NOT LIABLE TO THE SEMINOLES FOR THE $57,500 WHICH IT PAID OUT OF THE TRUST FUND ESTABLISHED BY ARTICLE III OF THE TREATY OF 1866 TO THE TRIBAL TREASURER FROM 1875 TO 1898 INCLUSIVE

Article III of the Treaty of March 21, 1866, established a trust of $70,000 (R. 12, fdg. VIII) and provided:

> seventy thousand dollars to remain in the United States treasury, upon which the

> United States shall pay an annual interest of five percent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools; the remainder of the seventy thousand dollars, being twenty thousand dollars, shall remain a permanent fund, the interest of which shall be paid annually for the support of the Seminole government; * * *

Under this treaty the interest on the $50,000 fund, amounting to $2,500 annually, was required to be paid for "the support of schools." During the period from 1875 to 1898 inclusive, the Government paid the annuity direct to the tribal treasurer (R. 13, fdg. IX). The lower court held (Opinion, Item 5. R. 20–22) that the Government violated the treaty in making these payments to the treasurer, and therefore entered judgment against the Government for $57,500 (which apparently represents 23 instead of 24 payments at the rate of $2,500 a year) (R. 22).

We contend that this payment was perfectly proper and in accordance with the treaty. As we have already pointed out, the Seminoles, until 1906, had their own government, see pages 48–49, *supra,* and conducted their own schools, see footnote 17 on page 59, *supra.*[18a] Under these circumstances, the

[18a] See also Annual Reports of the Department of the Interior for the fiscal year ended June 30, 1900, 56th Cong., 2nd sess,. House Doc. No. 5, Indian Affairs, p. 86.

tribal treasurer was an entirely appropriate person to receive the interest payment for the support of schools. It is not shown that he failed to apply the money in the intended manner, and at this distance of time we should presume that he acted with official regularity. See *The Sac and Fox Indians*, 220 U. S. 481, 484.

Moreover, if the payment was erroneous, the tribe, by its governmental representatives, acquiesced in the error, and they are now estopped to attack a payment to which they consented. See pages 65–66, *supra*.

IV

THE GOVERNMENT IS NOT LIABLE TO THE SEMINOLES FOR THE $154,455.30 WHICH IT PAID FROM 1920 TO 1930 INCLUSIVE OUT OF THE PRINCIPAL OF THE $500,000 TRUST FUND SET APART BY THE SEMINOLE AGREEMENT OF 1897

The Seminole Agreement of 1897, ratified by the Act of July 1, 1898, c. 542, 30 Stat. 567, 568 (R. 26) provided that—

> Five hundred thousand dollars ($500,000) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five per cent interest, or invested so as to produce such amount of interest, which shall be, after extinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of

> the Seminole people; and there shall be selected and excepted from allotment three hundred and twenty acres of land for each of said academies and eighty acres each for eight district schools in the Seminole country.

The lower court found (R. 14, fdg. XIII) that the Secretary of the Interior disbursed from the principal of this fund (a) for per capita payments, $25,744.50 in 1920 and $6,701.06 in 1921; (b) for equalization of allotments, $490.22 in 1921; and (c) for education, $17,743.43 in 1922, $16,679.86 in 1923, $247.94 in 1924, $6,504.72 in 1925, $12,809.52 in 1926, $17,815.59 in 1927, $19,685.35 in 1928, $1.29 in 1929, and $30,031.82 in 1930. The lower court held (R. 26–27, Opinion, Item 9) that all of these disbursements from the principal were illegal, and that the Government was liable for the total diversions, amounting to $154,455.30 (R. 27).

Our contention is that the payments were not unlawful but were specifically authorized by Congressional statutes subsequent to the Agreement of 1897. Of course, the respondent does not deny that "as regards tribal property subject to the control of the United States as guardian of Indians, Congress may make such changes in the management and disposition as it deems necessary to promote their welfare." *Morrison* v. *Work,* 266 U. S. 481, 485. Such changes fall well within the power of Congress to modify treaties with the Indians. *Stephens* v. *Cherokee Nation,* 174 U. S. 445; *Lone*

Wolf v. *Hitchcock,* 187 U. S. 553. The narrow point as to which petitioner and respondent are at issue is: whether Congress did in fact make such changes in the Agreement of 1897 as to authorize the particular payments that were made. This issue requires merely an examination of the relevant statutes, first as to the payments per capita, and then as to the payments for education.

The per capita payments of $25,744.50 in 1920 and $6,701.06 in 1921 were authorized by the Indian Appropriation Act for the fiscal year 1919, Act of May 25, 1918, c. 86, 40 Stat. 561, 580, which provided:

> That *the Secretary of the Interior be, and he is hereby, authorized to pay to the enrolled members of the Seminole Tribe of Indians* of Oklahoma entitled under existing law to share in the funds of said tribe, or to their lawful heirs, *out of the Seminole school fund,* or any moneys belonging to said tribe in the United States Treasury or deposited in any bank or held by an official under the jurisdiction of the Secretary of the Interior, *not to exceed $100 per capita: Provided,* That said payment shall be made under such rules and regulations as the Secretary of the Interior may prescribe: * * * [Italics added.]

There is no dispute that the act authorized the making of some per capita payments out of this $500,000 Seminole School Fund with which we are concerned. In the brief opposing our petition for

certiorari, respondent states (Br. Opp. p. 35): "We admit that this act authorized a *per capita* payment out of the school fund." The difference of opinion between the respondent and ourselves is as to how long that authority continued. The respondent argues that the authority was limited to one year, but we contend that the authority has no limitation in time. The statute does not expressly impose a restriction as to time. And we submit that the mere accident that the authority was included in an annual appropriation act does not show that it has limited duration or applicability. This Court has had frequent occasion to regard as permanent additions to the body of law provisions which were originally enacted as part of an appropriation bill for a single year.[19]

Moreover, in subsequent legislation, Congress recognized that the authority for the making of

[19] For example, the Deficiencies Appropriation Act of Oct. 22, 1913, c. 32, 38 Stat. 208, 220, U. S. C., Ti. 28, § 47, provided the permanent procedure regarding interlocutory injunctions as to orders of the Interstate Commerce Commission; the Act Making Appropriations for the Fiscal Year ending June 30, 1918, for the legislative, executive, and judicial expenses of the Government, Act of March 3, 1917, c. 163, 39 Stat. 1070, 1106, U. S. C., Ti. 5, § 66, added to the criminal law a permanent provision prohibiting officers of the United States from receiving for their official services compensation from outside sources; and the Indian Appropriation Act of July 1, 1898, c. 545, 30 Stat. 571, 595, U. S. C., Ti. 25, § 32, made permanent provision for accounting by Indian agents. See also the statutes discussed in the *Sac and Fox Indians* case, 220 U. S. 481, and set out *in extenso*, pages 60–63, *supra*.

per capita payments extended beyond 1919 and into 1920 and 1921, the years as to which dispute exists. Thus in the Act of June 30, 1919, c. 4, 41 Stat. 3, 23, Congress directed:

> That during the fiscal year ending June 30, 1920, no moneys shall be expended from tribal funds belonging to the Five Civilized Tribes, without specific appropriation by Congress except as follows: *Equalization of allotments, per capita and other payments authorized by law* to individual members of the respective tribes, * * *

And substantially the same provision was made with respect to the fiscal year 1921 by the Act of Feb. 14, 1920, c. 75, 41 Stat. 408, 427–428, printed in the Appendix, p. 18. These statutes cover not merely the per capita payments, but apparently also the payment of $490.22 for equalization of allotments.

The payments from 1922 through 1930 for education are authorized by the appropriation Acts for this period, Act of March 3, 1921, c. 119, 41 Stat. 1225, 1242; Act of May 24, 1922, c. 199, 42 Stat. 552 575; Act of Jan. 24, 1923, c. 42, 42 Stat. 1174, 1196; Act of June 5, 1924, c. 264, 43 Stat. 390, 398; Act of March 3, 1925, c. 462, 43 Stat. 1141, 1148; Act of May 10, 1926, c. 277, 44 Stat. 453, 460; Act of Jan. 12, 1927, c. 27, 44 Stat. 934, 948; Act of March 7, 1928, c. 137, 45 Stat. 200, 216; Act of March 4, 1929, c. 705, 45 Stat. 1562, 1577 (all of which are printed in the Appendix, pages 19–23). In each of these

years (except 1929, where the provision has a slightly different form) Congress provided that:

> The Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes from the tribal funds of those nations.

There is no dispute that these statutes authorize the use of the *interest* on the Seminole $500,000 School Fund for payments for education from 1922 through 1930 (Br. Opp., p. 36). The question at issue is whether they also authorize the use of the *principal* for that purpose.

We contend that the authority is not expressly limited to payments of interest, and that in the statute there is an implication to the contrary. Congress' primary purpose was "to continue during the ensuing fiscal year the tribal and other schools." If for that end payments of principal were necessary, then they were authorized. And, indeed, such payments must have been anticipated, for the Seminole fund was substantially reduced by the per capita expenditures in 1919, 1920, and 1921, see pages 70–72, *supra,* and the interest available on the reduced fund would not thereafter have sufficed to continue the schools.

The only argument advanced against our contention is that when it was created the fund was described "as a *permanent* school fund." But

this, though some indication of an original intent not to spend principal, is not strictly promissory and does not prevail against a subsequent direction of Congress. See page 69, *supra*.

V

THE GOVERNMENT IS NOT LIABLE TO THE SEMINOLES FOR $9,068.24 ON ACCOUNT OF ITS PROMISE, UNDER ARTICLE VI OF THE TREATY OF 1866, TO CONSTRUCT AGENCY BUILDINGS

By Article VI of the Treaty of March 21, 1866, 14 Stat. 755, 758 (R. 12–13, fdg. VIII) the Government promised the Seminoles—

> that the United States shall cause to be constructed, at an expense not exceeding ten thousand ($10,000) dollars, suitable agency buildings, the site whereof shall be selected by the agent of said tribe, under the direction of the superintendent of Indian affairs; in consideration whereof, the Seminole nation hereby relinquish and cede forever to the United States one section of their lands, upon which said agency buildings shall be directed [erected], which land shall revert to said nation when no longer used by the United States, upon said nation paying a fair value for said buildings at the time vacated.

The Government disbursed for this purpose the sum of $931.76 (R. 13–14, fdg. XI). The lower court held the Government liable for the difference

between that sum and $10,000, or $9,068.24 (R. 23, Opinion, Item 7).

Our first contention is that the Government never broke its treaty obligation. The respondent and the lower court have entirely misunderstood this article of the treaty. The Seminoles were "to cede forever to the United States one section of their lands." Upon these lands the United States was to "erect suitable agency buildings", to be "used by the United States." When the buildings were "no longer used by the United States" the "land shall revert to said nation", "upon said nation paying a fair value for said buildings at the time vacated."

It is clear that the Seminoles were not concerned with the value of the buildings so long as the United States held them. They were interested only when the United States no longer wanted the buildings, and the Seminoles could re-acquire the land upon paying a fair value for said buildings. It was to the interest of the Seminoles to have the buildings cost less rather than more. For their protection a clause was inserted stating that the Government would erect buildings "at an expense of *not exceeding* ten thousand dollars", not at an expense of *at least* ten thousand dollars. And the Government has performed this promise.

Even if we take the lower court's view and assume that there was an affirmative promise, the promise was indefinite in amount. Moreover, sub-

sequent appropriation acts of Congress did not fix the obligation as the respondent argues (Br. Opp. p. 39). Those acts were unilateral in character. They merely set for administrative authorities an *upper* limit for expenditure. Obviously there was no intent to require the head of a department to spend to the last cent the amount made available to his department.

Finally, we contend that if the Government did break its obligation, the liabilities for that breach have been ascertained by following an erroneous rule of damages. The lower court has held that the Government is liable for the difference between (1) what the lower court regarded as the value of the buildings that the Government had promised to erect and (2) the amount actually expended by the United States. But that rule of damages is appropriate only if the promisee is to own and occupy the premises. Here the Indians were not to do either; they were merely to be business invitees. They were damaged by the difference, if any, between (1) the value of doing business with a government agent who occupies a $10,000 building and (2) the value of doing business with a government agent who occupies a building costing $931.76.[19a]

[19a] "The rule of the common law is * * * that the actual loss caused by breach of contract is the loss of what the contractee would have had if the contract had been performed, less the proper deductions." *Chicago, Milwaukee & St. Paul Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 100; 3 Williston, *Contracts*, § 1338.

VI

THE GOVERNMENT IS NOT LIABLE TO THE SEMINOLES FOR $61,563.42 ON ACCOUNT OF ITS PROMISE IN ARTICLE VIII OF THE TREATY OF 1856 TO PROVIDE ANNUALLY FOR TEN YEARS $3,000 FOR THE SUPPORT OF SCHOOLS, $2,000 FOR AGRICULTURAL ASSISTANCE, AND $2,200 FOR THE SUPPORT OF SMITHS AND SMITH SHOPS

By Article VIII of the Treaty of August 7, 1856, 11 Stat. 699, 702 (R. 10, fdg. III), the Government promised the Seminoles

> to provide annually for ten years the sum of three thousand dollars for the support of schools, two thousand dollars for agricultural assistance, and two thousand two hundred dollars for the support of smiths and smith shops among them. * * *

The period covered by this Article is from the fiscal year 1858 to 1867, inclusive (R. 11, fdg. IV). The lower court did not find how much the Government spent in each year. However, it did find that during each of the ten years the money was regularly appropriated, but in the period as a whole only $10,436.58 was spent for the purposes originally intended (R. 11, fdg. IV). In its opinion it recognized that more than the equivalent of the balance of the money appropriated had during the Civil War been diverted to loyal refugee Indians (R. 18. Cf. R. 11, fdg. V). The Government contended that these diversions to loyal Indians were authorized by statute and approved by treaty; that by virtue of this authority the Government could not be

held liable for shortages until the year 1867; and that for the year 1867 the shortage was only $2.50. However, the lower court ruled that as a matter of law the diversions were not authorized and entered judgment against the United States for $61,563.42, the difference between the amount due for 10 years, $72,000, and the amount expended for the purposes contemplated in the treaty (R. 16–18; Opinion, Item 1).

We have four grounds for contending that the diversions up to and including 1866 were authorized: the Resolution of February 22, 1862; the Indian Appropriation Act of 1863; the Indian Appropriation Acts of 1864, 1865, and 1866; and the Treaty of March 21, 1866.

A. THE RESOLUTION OF FEBRUARY 22, 1862

In chronological order, our first reliance is upon the Resolution of February 22, 1862, No. 13, 12 Stat. 614, which provides:

> That the Secretary of the Interior be authorized to pay out of the annuities payable to the Seminoles, Creeks, Choctaws, and Chickasaws, and which have not been paid, in consequence of the cessation of intercourse with those tribes, so much of the same as may be necessary to be applied to the relief of such portions of said tribes as have remained loyal to the United States, and have been or may be driven from their homes in the Indian Territory into the State of Kansas or elsewhere.

This statute authorized the Secretary of the Interior to divert to loyal refugee Indians "annuities payable to the Seminoles." We have noted that in fact more than the equivalent of the amount appropriated up to and including 1866 was diverted (R. 18), and the point at issue is whether this statute authorized such diversion. This turns on whether payments of this type are included in the scope of the statute; and if so, for what years.

In our opinion, the word "annuities" embraces the payments now in question. Certainly the payments fall within the usual interpretation of the term "annuities", which ordinarily means fixed annual payments to be paid absolutely and without contingency. *Peck* v. *Kinney,* 143 Fed. 76, 80 (C. C. A. 2d); *Bacon* v. *Commissioner of Corporations and Taxation,* 266 Mass. 547, 549; *Town of Hartland* v. *Damon's Estate,* 103 Vt. 519, 531. The respondent takes the position that the term is strictly limited to annual per capita payments of income on Seminole trusts. But such an extraordinary construction has no linguistic or other justification. In the drafting or construing of Indian statutes "annuity" is not a word of art, or, if it has a technical significance, it is a generic term embracing annual payments for education, agriculture, and blacksmiths, as well as the particular species of annual disbursements known as "per capita" payments. Moreover, the *policy* embodied in this particular statute applies as much

to annual payments for blacksmiths and the like as to annual payments per capita. In either case Congress intended to punish and to withhold the sinews of war from disloyal Indians.

It is more difficult to be certain which years are embraced in the statute. Annual payments due prior to the enactment of the statute seem to be covered by the descriptive clause "which have not been paid, in consequence of the cessation of intercourse with those tribes." Annual payments subsequent to enactment are covered by the clause "payable to the Seminoles" only if the sentence is regarded as elliptic and is read as though it provided "out of the annuities payable to the Seminoles, Creeks, Choctaws, and Chickasaws, and *out of the annuities* which have not been paid", etc. This reading, we submit, is, in view of the purposes of the statute, not unjustifiable.

B. THE INDIAN APPROPRIATION ACT OF 1863

However, whether the statute just considered furnishes a total or a partial defence for the period from 1858 to 1866 is perhaps immaterial, in view of the Indian Appropriation Act of 1863, Act of July 5, 1862, c. 135, 12 Stat. 512, 528, which provides:

> For defraying the expenses of the removal and subsistence of Indians in Oregon and Washington Territory (not parties to any treaty) and for pay of necessary employees, fifty thousand dollars: *Provided,*

That all appropriations heretofore or hereafter made to carry into effect treaty stipulations, or otherwise, in behalf of any tribe or tribes of Indians, all or any portion of whom shall be in a state of actual hostility to the government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, may and shall be suspended and postponed wholly or in part at and during the discretion and pleasure of the President: Provided further, That the President is authorized to expend such part of the amount heretofore appropriated and not expended and hereinbefore appropriated for the benefit of the tribes named in the preceding proviso as he may deem necessary, for the relief and support of such individual members of said tribes as have been driven from their homes and reduced to want on account of their friendship to the government. And an account shall be kept of the sums so paid for the benefit of such tribe, which account shall be rendered to Congress at the commencement of the next session thereof. And all purchases of articles for the purposes above set forth, shall be made on advertisement, as provided in other cases, and an account shall be rendered of all such purchases, with a statement of the prices paid therefor: *And provided further,* That in cases where the tribal organization of any Indian tribe shall be in actual hostility to the United States, the President is hereby

> authorized, by proclamation, to declare all treaties with such tribe to be abrogated by such tribe, if, in his opinion, the same can be done consistently with good faith and legal and national obligations.

There can be no doubt whatsoever that the first proviso of this statute is broad enough to cover payments of the type we are now considering, whether the payments were made before or after its enactment. The proviso expressly applies to "all appropriations heretofore or hereafter made to carry into effect treaty stipulations." But the respondent contends that this statute never came into operation because, to become effective, it required Presidential action.

To that argument our first answer is that, properly construed, the statute requires no executive impetus; it *ipso facto* imposes the prohibition. It gives to the President the power to raise this prohibition, but not the power originally to impose it. The exact language used is that the appropriations "may and *shall* be suspended and postponed wholly or in part at and during the discretion and pleasure of the President." This is a mandate of immediate suspension with a condition subsequent. The difference between a condition subsequent and a condition precedent is emphasized by contrasting language in other parts of the same section of the statute. In the second proviso, the one immediately following the ban, and more particularly in the final proviso at the very end of our quota-

tion from the statute, the Act gives to the President additional authority over other matters. In the final proviso, executive action is clearly made a condition precedent to the operation of the statute; and, as we should expect, there, standards are prescribed and findings required. Thus, the President is authorized to abrogate treaties only "if, in his opinion, the same can be done consistently with good faith and legal and national obligations." The very absence of standards and a requirement of a finding in the first proviso, the one with which we are concerned, should incline this Court, if the matter were doubtful, to construe it as making executive action a condition subsequent. This would avoid a question as to the constitutionality for there is no requirement that standards be prescribed where an exemption or benefit is granted. *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502, 507. Such a situation is unlike the case of a statute which imposes a ban or suspension. Cf. *Field* v. *Clark*, 143 U. S. 649, 693–694; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 415, 426; *Schechter Corp.* v. *United States*, 295 U. S. 495, 529–530.

If, however, the clause be construed as requiring an affirmative direction by the President as a condition precedent, we are justified, after the lapse of so many years, in inferring that it was given. The appropriations were in fact paid by the Government for loyal and refugee Indians and, as Mr. Justice Holmes said in a parallel case, "we must

presume, at this distance of time, that its decision was made under the direction of the President." *The Sac and Fox Indians,* 220 U. S. 481, 484

C. THE INDIAN APPROPRIATION ACTS OF 1864, 1865, AND 1866

Our third defense to the claim we are now considering rests upon Section 3 of the Indian Appropriation Act of 1864, Act of March 3, 1863, c. 99, 12 Stat. 774, 793; Section 2 of the Indian Appropriation Act of 1865, Act of June 25, 1864, c. 148, 13 Stat. 161, 180; and Section 5 of the Indian Appropriation Act of 1866, Act of March 3, 1865, c. 127, 13 Stat. 541, 562 (all set forth in the Appendix, pages 11-14). The Indian Appropriation Act for 1864 provides as follows (12 Stat. 793):

> That the Secretary of the Interior be, and he is hereby authorized to expend such part of the amount heretofore appropriated to carry into effect any treaty stipulation with any tribe or tribes of Indians, all, or any portion of whom shall be in a state of actual hostility to the Government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, as may be found necessary to enable such individual members of said tribes as have been driven from their homes, and reduced to want on account of their friendship to the United States, to subsist until they can be removed to their homes, and to assist them in such removal:
> * * *

The succeeding appropriation Acts repeat the language almost verbatim. See Appendix, pages 12–14. In each case the language is direct and unequivocal. The Secretary of the Interior is authorized to divert to loyal refugee Indians "such part of the amount heretofore appropriated to carry into effect any treaty stipulation with * * * the * * * Seminoles * * * as may be found necessary." It seems to us that, so far as concerns diversions up to and including the appropriations for the fiscal year 1866 (13 Stat. 541, 562), this defense alone, without reference to any other statute or treaty, is unanswerable;[20] and neither the lower court nor, so far, the respondent has tried to give an answer.

D. THE TREATY OF MARCH 21, 1866

Our fourth and final defense is based on Article VIII of the Treaty of March 21, 1866, 14 Stat. 755, 759–760, which provides:

> The stipulations of this treaty are to be a full settlement of all claims of said Seminole nation for damages and losses of every kind growing out of the late rebellion, and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of an-

[20] If, as we maintain, Congress did modify the treaty of 1856 by statutes in 1863, 1864, and 1865, this modification was effective without the approval of the Indian tribe. *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553.

> nuities for that purpose, consequent upon the late war with the so-called confederate states. And the Seminoles hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Seminole nation by the United States. And the United States agree that no annuities shall be diverted from the objects for which they were originally devoted by treaty stipulations with the Seminoles, to the use of refugee and destitute Indians, other than the Seminoles or members of the Seminole nation, after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six.

The opening sentence of this Article has two releases: one a release by the Seminoles of "all claims of said Seminoles [against the United States] for damages and losses of every kind growing out of the late rebellion"; the other a release probably by the United States, but perhaps by the Seminoles, of claims on account of "all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians." In the second sentence the "Seminoles hereby ratify and confirm all such diversions of annuities."

We construe this Article as giving us a double defense. We rely at the outset upon the first release in the opening sentence. The administrative authorities diverted the annual payments because of the disloyal acts of the Seminoles and the assistance they afforded "the rebels." Hence it may

properly be said that the diversion was a damage or loss to them "growing out of the late rebellion." We also rely upon the second sentence. We have already pointed out, pages 78–79, *supra,* that in our opinion the term "annuities" is broad enough to cover the annual payments now in question. If our position is sound, then the diversions were specifically ratified and confirmed by this treaty.

If this Court sustains any one of the four defenses we have outlined, the judgment of $61,563.42 given below should be reversed, and the case remanded to the Court of Claims for appropriate proceedings. Presumably that court will then make findings as to—

> (1) how much of the money appropriated, pursuant to Article VIII of the Treaty of August 7, 1856, during the nine-year period from 1858 to 1866, for support of schools, for agricultural assistance, and for the support of smiths and smith shops, was diverted to enable such individual members of the Cherokee, Creek, Choctaw, Chickasaw, Seminole, Wichita, and affiliated tribes, as had been driven from their homes, and reduced to want on account of their friendship to the United States, to subsist until they could be removed to their homes, and to assist them in such removal;
>
> (2) how much the Government spent pursuant to Article VIII of the Treaty of August 7, 1856, during the fiscal year 1867, for the support of schools, for agricultural

assistance, and for the support of smiths and smith shops.

Of course it will be unnecessary to order this partial remand if this Court agrees with our contention made under Point I, page 32, *supra,* that the Court of Claims had no jurisdiction of the Seminole claim for $61,563.42.

VII

THE GOVERNMENT IS ENTITLED TO HAVE SET OFF AGAINST ITS UNDERPAYMENTS OF AMOUNTS DUE IN SOME YEARS UNDER ARTICLE VIII OF THE TREATY OF 1856 AND ARTICLE III OF THE TREATY OF 1866 THE AMOUNTS BY WHICH IN OTHER YEARS IT MADE OVERPAYMENTS OR MISCELLANEOUS PAYMENTS ON THOSE AND OTHER TREATY OBLIGATIONS

The Government was obligated to pay to the Seminoles an annuity of $25,000 under Article VIII of the Treaty of 1856 (R. 10–11, fdg. III) and an annuity of $3,500 under Article III of the Treaty of 1866 (R. 12, fdg. VIII). In *several years* the Government fell short of the amount it promised. The lower court found (R. 11–12, fdg. VI; R. 13, fdg. IX) that the gross underpayments with respect to the first trust amounted to $154,551.28 (R. 19–20, Opinion, Item 3), and with respect to the second trust amounted to $3,097.20 and $750 (R. 20–22, Opinion, Item 5).

The Government contended that against this gross shortage it was entitled to receive credit or offsets for the amounts by which in *other years* it had made overpayments or miscellaneous payments

with respect to Article VIII of the Treaty of 1856, Article III of the Treaty of 1866, and other obligations. The lower court refused to make findings as to whether or not there had been overpayments or miscellaneous payments, but ruled that such payments could not be considered because (R. 20):

> The United States has asserted no counterclaim, hence there is no claim against the plaintiff tribe which the court is authorized to "hear, examine, consider, and adjudicate." Even if the plaintiff received the benefit of the payments, and that fact is not established, they were payments made outside of the provisions of the treaty and as such were gratuities which the court, under the jurisdictional act, is without authority to offset against the plaintiff's claim.

This ruling seems to rest on three grounds, the first two of which are conclusions of law and the third a purported statement of fact: (1) that the Court of Claims had no jurisdiction to decide whether the Government was entitled to an offset because no counterclaim was filed; (2) that if the Government did overpay the amount of income due in any year, it was a "gratuity", for which recovery could not be had; and (3) that it is not established that the Seminoles received the benefit of the payments.

Of course, if the third ground were buttressed by a specific finding of fact, we would have no standing in this Court to raise the questions of law. But

it is a loose, entirely unsupported statement. In the findings of fact there is no technical finding one way or the other respecting the overpayments and miscellaneous payments. This is brought out by the obvious and suspicious gaps in the table in finding VI (R. 12), which invites scrutiny. It states, for example, what happened in 1876, but it entirely neglects 1877. If the lower court had made findings with respect to 1877, it would necessarily, on the uncontradicted evidence of the very pages of the General Accounting Office Report to which its table refers (see Appendix, page 52), have found that in 1877 the Government made an overpayment of $11,381. We cite this example merely for purposes of illustration.

Thus we have a situation in which the *findings* of fact do not and could not furnish any warrant for the loose statement of fact in the opinion. The ruling of the Court can stand only if one of its two propositions of law is sound.

The first proposition of law is that because the Government did not file a counterclaim, it is not entitled to set off against underpayments in one year overpayments in other years. This proposition is untenable if the case is, as the respondent has repeatedly contended (Br. Opp. 14), founded on a petition by a beneficiary for a general accounting. It would be anomalous for a beneficiary to be able to ignore the net balance shown by the accounts and to hold the trustee liable only for those

items in the account which favored him. And this is not the law. It is well settled that "in a bill for an accounting, both parties are actors, and a defendant may have a decree in his favor without the aid of a cross-bill." *Braman* v. *Foss,* 204 Mass. 404, 411; *Arwshan* v. *Meshaka,* 288 Mass. 31, 33. It is hornbook learning that in a suit against a trustee for an accounting, he is entitled to credit against or withhold from any amount owing to the beneficiary any amount already paid the beneficiary when it was not due. *Livesey* v. *Livesey,* 3 Russ. 287, 295–296; *Dibbs* v. *Goren,* 11 Beav. 483, 484; *Hammond* v. *Hammond,* 169 Mass. 82, 85; *Bailey* v. *Smith,* 214 Mass. 114, 120; *King's Estate,* 147 Pa. 410; *Equitable Trust Co.* v. *Miller,* 185 N. Y. Supp. 661, aff'd, 197 App. Div. 391, aff'd, 233 N. Y. 650; Perry, *Trusts and Trustees,* 7th ed., § 915, 930; Bogert, *Trusts and Trustees,* pp. 2364–2365. This hornbook rule is not affected by Section 3 of the jurisdictional statute Act of May 20, 1924, c. 162, 43 Stat. 133, 134, which provides:

> SEC. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation, but any payment which may have been made by the United States upon any claim against the United States shall not operate as an estoppel, but may be pleaded as an offset in such suit.

That section obviously refers to offsets arising from transactions in no way related to the transaction on which the principal claim is founded, and is intended to give the United States additional procedural rights, not to cut down those already existing.

The second proposition laid down by the lower court, that the payments were outside of the provisions of the treaty and as such were gratuities, is a ruling that depends on facts not shown in the record. The lower court has neglected to make findings as to the payments or their purposes. Hence we cannot tell if the ruling is correct. Since the judgments of $154,551.28, $3,097.20, and $750 rest upon rulings of law unsupported by the findings of fact, the case should be remanded to the Court of Claims.

Presumably when the case is returned to that court it will examine the particular offsets claimed by the Government and will determine (from evidence admittedly not now before this Court, but the general character of which is idential with that upon which findings were made, and the tenor of which is indicated in the Appendix, pp. 51–54)—

> (1) whether the Government, on account of its obligation to pay interest of $25,000 annually on the trusts established by Article VIII of the Treaty of August 7, 1856, paid (a) $25,082.25 in 1875, $36,381 in 1877,

$25,454 in 1880, $25,028 in 1882, and $25,182.29 in 1883 (General Accounting Office Report, pages 153–156); and (b) at the request of the Council of the Seminole Nation, $17,821 to individuals in 1870, and $11,101.64 to satisfy drafts in 1874 (General Accounting Office Report, pages 152, 153).

(2) whether the Government, on account of its obligations to pay interest of $25,000 annually on the trusts established by Article VIII of the Treaty of August 7, 1856, and $3,500 annually on the trusts established by Article III of the Treaty of March 21, 1866 (or a total of $71,250 for the second half of 1907, for 1908, and 1909), paid $71,250, as follows: $42,747 in 1908, $11,002.96 in 1909, $15,200 in 1910, $2,100 in 1919, and $200.04 in 1921 (General Accounting Office Report, pages 308–310).

(3) what, if any, net balance there is if the payments mentioned in the preceding paragraphs are offset against the underpayments of $154,551.28, $3,097.20, and $750, for which the Government was held liable in the Opinion of the Court of Claims, Items 3 and 5 (R. 20, 22).

Of course, it will be unnecessary to order this partial remand if this Court agrees with our contention, made under Point I, *supra,* that the Court of Claims had no jurisdiction of the Seminole claims for underpayments of $61,563.42, $3,097.20, and $750 (pages 33–34, numbers (4) and (5), *supra*).

CONCLUSION

In view of the foregoing, we respectfully submit that the judgment of the Court of Claims should be reversed or, in the alternative, reversed and remanded.

Respectfully submitted.

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APPENDIX

PART I. JURISDICTIONAL STATUTES

ACT OF MAY 20, 1924, C. 162, 43 STAT. 133, 134

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian Affairs, which said Seminole Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

SEC. 2. Any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of approval of this Act, and such suit shall make the Seminole Nation party plaintiff and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claim or claims under contract with the Seminoles

approved by the Commissioner of Indian Affairs and the Secretary of the Interior; and said contract shall be executed in their behalf by a committee chosen by them under the direction and approval of the Commissioner of Indian Affairs and the Secretary of the Interior. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said Indian nation to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys of said Indian nation.

SEC. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation, but any payment which may have been made by the United States upon any claim against the United States shall not operate as an estoppel, but may be pleaded as an offset in such suit.

SEC. 4. That from the decision of the Court of Claims in any suit prosecuted under the authority of this Act, an appeal may be taken by either party as in other cases to the Supreme Court of the United States.

ACT OF FEB. 19, 1929, C. 268, 45 STAT. 1229

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the time within which suits may be instituted under the Act of Congress approved March 19, 1924, entitled "An Act conferring jurisdiction upon the Court of Claims to hear, examine, adjudicate, and enter judgment in any claims which the Cherokee Indians may have

against the United States, and for other purposes"; the Act of Congress approved May 20, 1924, entitled "An Act conferring jurisdiction upon the Court of Claims to hear, examine, adjudicate, and enter judgment in any claims which the Seminole Indians may have against the United States, and for other purposes"; the Act of Congress approved May 24, 1924, entitled "An Act conferring jurisdiction upon the Court of Claims to hear, examine, adjudicate, and enter judgment in any claims which the Creek Indians may have against the United States, and for other purposes"; and the Act of Congress approved June 7, 1924, entitled "An Act conferring jurisdiction upon the Court of Claims to hear, examine, adjudicate, and enter judgment in any claims which the Choctaw and Chickasaw Indians may have against the United States, and for other purposes", shall be extended to June 30, 1930, to permit each Indian nation or tribe mentioned in said Acts of Congress to institute suits as provided in said Acts and the joint resolution approved May 19, 1926 (Public Resolution Numbered 27, Sixty-ninth Congress).

PART II.° TREATIES AND AGREEMENTS

TREATY OF AUGUST 7, 1856, BETWEEN THE UNITED STATES AND THE CREEK AND SEMINOLE TRIBES OF INDIANS, 11 STAT. 699, 702.

ARTICLE VIII. The Seminoles hereby release and discharge the United States from all claims and demands which their delegation have set up against them, and obligate themselves to remove to and settle in the new country herein provided for them as soon as practicable. In consideration of such release, discharge, and obligation, and as

the Indians must abandon their present improvements, and incur considerable expense in reestablishing themselves, and as the government desires to secure their assistance in inducing their brethren yet in Florida to emigrate and settle with them west of the Mississippi River, and is willing to offer liberal inducements to the latter peaceably so to do, the United States do therefore agree and stipulate as follows, viz: To pay to the Seminoles now west, the sum of sixty[1] thousand dollars, which shall be in lieu of their present improvements, and in full for the expenses of their removal and establishing themselves in their new country; to provide annually for ten years the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith shops among them, said sums to be applied to these objects in such manner as the President shall direct. Also to invest for them the sum of two hundred and fifty thousand dollars, at five percent per annum, the interest to be regularly paid over to them *per capita* as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the two sums so invested, shall constitute a fund belonging to the united tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them *per capita* as an annuity; but no portion of the principal thus

[1] See Amendment, substituting ninety for sixty, *post*, p. 706.

invested, or the interest thereon annually due and payable, shall ever be taken to pay claims or demands against said Indians, except such as may hereafter arise under the intercourse laws.

ARTICLE IX. The United States agree * * * to expend for them in improvements, after they shall all remove, the sum of twenty thousand dollars * * *.

TREATY OF MARCH 21, 1866, BETWEEN THE UNITED STATES AND THE SEMINOLE NATION, 14 STAT. 755, 756

ARTICLE III. In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Seminoles cede and convey to the United States their entire domain, being the tract of land ceded to the Seminole Indians by the Creek nation under the provisions of article first (1st), treaty of the United States with the Creeks and Seminoles, made and concluded at Washington, D. C., August 7, 1856. In consideration of said grant and cession of their lands, estimated at two million one hundred and sixty-nine thousand and eighty (2,169,080) acres, the United States agree to pay said Seminole nation the sum of three hundred and twenty-five thousand three hundred and sixty-two ($325,362) dollars, said purchase being at the rate of fifteen cents per acre. The United States having obtained by grant of the Creek nation the westerly half of their lands, hereby grant to the Seminole nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole nation are bounded and described as follows, to wit: Beginning on the Canadian river where the

line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866, following said line due north to where said line crosses the north fork of the Canadian river; thence up said north fork of the Canadian river a distance sufficient to make two hundred thousand acres by running due south to the Canadian river; thence down said Canadian river to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of one hundred thousand dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written. The balance due the Seminole nation after making said deduction, amounting to one hundred thousand dollars, the United States agree to pay in the following manner, to wit: Thirty thousand dollars shall be paid to enable the Seminoles to occupy, restore, and improve their farms, and to make their nation independent and self-sustaining, and shall be distributed for that purpose under the direction of the Secretary of the Interior; twenty thousand dollars shall be paid in like manner for the purpose of purchasing agricultural implements, seeds, cows, and other stock; fifteen thousand dollars shall be paid for the erection of a mill suitable to accommodate said nation of Indians; seventy thousand dollars to remain in the United States treasury, upon which the United States shall pay an annual interest of five percent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid

annually and appropriated to the support of schools; the remainder of the seventy thousand dollars, being twenty thousand dollars, shall remain a permanent fund, the interest of which shall be paid annually for the support of the Seminole government; forty thousand three hundred and sixty-two dollars shall be appropriated and expended for subsisting said Indians, discriminating in favor of the destitute; all of which amounts, excepting the seventy thousand dollars, to remain in the treasury as a permanent fund, shall be paid upon the ratification of said treaty, and disbursed in such manner as the Secretary of the Interior may direct. The balance, fifty thousand dollars, or so much thereof as may be necessary to pay the losses ascertained and awarded as hereinafter provided, shall be paid when said awards shall have been duly made and approved by the Secretary of the Interior. And in case said fifty thousand dollars shall be insufficient to pay all said awards, it shall be distributed pro rata to those whose claims are so allowed; and until said awards shall be thus paid, the United States agree to pay to said Indians, in such manner and for such purposes as the Secretary of the Interior may direct, interest at the rate of five per cent per annum from the date of the ratification of this treaty.

ARTICLE VI. Inasmuch as there are no agency buildings upon the new Seminole reservation, it is therefore further agreed that the United States shall cause to be constructed, at an expense not exceeding ten thousand ($10,000) dollars, suitable agency buildings, the site whereof shall be selected by the agent of said tribe, under the direction of the Superintendent of Indian affairs; in consider-

ation whereof, the Seminole Nation hereby relinquish and cede forever to the United States one section of their lands, upon which said agency buildings shall be *directed* [erected], which land shall revert to said nation when no longer used by the United States, upon said nation paying a fair value for said buildings at the time vacated.

ARTICLE VIII. The stipulations of this treaty are to be a full settlement of all claims of said Seminole nation for damages and losses of every kind growing out of the late rebellion, and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose, consequent upon the late war with the so-called confederate states. And the Seminoles hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Seminole nation by the United States. And the United States agree that no annuities shall be diverted from the objects for which they were originally devoted by treaty stipulations with the Seminoles, to the use of refugee and destitute Indians, other than the Seminoles or members of the Seminole nation, after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six.

AN ACT TO RATIFY THE AGREEMENT OF DECEMBER 16, 1897, BETWEEN THE DAWES COMMISSION AND THE SEMINOLE NATION, ACT OF JULY 1, 1898, C. 542, 30 STAT. 567, 568, 569

* * * * *

[Second full paragraph on page 568.]

Five hundred thousand dollars ($500,000) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent

school fund for the education of children of the members of said tribe, and shall be held by the United States at five per cent interest, or invested so as to produce such amount of interest, which shall be, after extinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of the Seminole people; and there shall be selected and excepted from allotment three hundred and twenty acres of land for each of said academies and eighty acres each for eight district schools in the Seminole country.

* * * * *

[Sixth full paragraph on page 568.]

All moneys belonging to the Seminoles remaining after equalizing the value of allotments as herein provided and reserving said sum of five hundred thousand dollars for school fund shall be paid per capita to the members of said tribe in three equal installments, the first to be made as soon as convenient after allotment and extinguishment of tribal government, and the others at one and two years, respectively. Such payments shall be made by a person appointed by the Secretary of the Interior, who shall prescribe the amount of and approve the bond to be given by such person; and strict account shall be given to the Secretary of the Interior for such disbursements.

* * * * *

[Last paragraph on page 569.]

* * * That the same be, and is hereby, ratified and confirmed, and all laws and parts of laws inconsistent therewith are hereby repealed.

PART III. STATUTES

RESOLUTION OF FEBRUARY 22, 1862, NO. 13, 12 STAT. 614

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be authorized to pay out of the annuities payable to the Seminoles, Creeks, Choctaws, and Chickasaws, and which have not been paid, in consequence of the cessation of intercourse with those tribes, so much of the same as may be necessary to be applied to the relief of such portions of said tribes as have remained loyal to the United States, and have been or may be driven from their homes in the Indian Territory into the State of Kansas or elsewhere.

INDIAN APPROPRIATION ACT FOR THE FISCAL YEAR 1863, ACT OF JULY 5, 1862, C. 135, 12 STAT. 512, 528

For defraying the expenses of the removal and subsistence of Indians in Oregon and Washington Territory (not parties to any treaty) and for pay of necessary employees, fifty thousand dollars: *Provided,* That all appropriations heretofore or hereafter made to carry into effect treaty stipulations, or otherwise, in behalf of any tribe or tribes of Indians, all or any portion of whom shall be in a state of actual hostility to the government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, may and shall be suspended and postponed wholly or in part at and during the discretion and pleasure of the President: *Provided, further,* That the President is authorized to expend such part of the amount heretofore appropriated and not expended and hereinbefore appro-

priated for the benefit of the tribes named in the preceding proviso as he may deem necessary, for the relief and support of such individual members of said tribes as have been driven from their homes and reduced to want on account of their friendship to the government. And an account shall be kept of the sums so paid for the benefit of such tribe, which account shall be rendered to Congress at the commencement of the next session thereof. And all purchases of articles for the purposes above set forth, shall be made on advertisement, as provided in other cases, and an account shall be rendered of all such purchases, with a statement of the prices paid therefor: *And provided, further,* That in cases where the tribal organization of any Indian tribe shall be in actual hostility to the United States, the President is hereby authorized, by proclamation, to declare all treaties with such tribe to be abrogated by such tribe, if, in his opinion, the same can be done consistently with good faith and legal and national obligations.

INDIAN APPROPRIATION ACT FOR THE FISCAL YEAR 1864, ACT OF MARCH 3, 1863, C. 99, 12 STAT. 774, 793

SEC. 3. *And be it further enacted,* That the Secretary of the Interior be, and he is hereby authorized to expend such part of the amount heretofore appropriated to carry into effect any treaty stipulation with any tribe or tribes of Indians, all, or any portion of whom shall be in a state of actual hostility to the Government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, as may be found necessary to enable such individual members of said tribes as have been

driven from their homes, and reduced to want on account of their friendship to the United States, to subsist until they can be removed to their homes, and to assist them in such removal: *Provided,* That an account shall be kept of the sums so paid for the benefit of the said members of said tribes, which account shall be rendered to Congress at the commencement of the next session thereof. And all purchases of articles for the purposes above set forth shall be made of the lowest responsible bidder, after sufficient public notice by advertisement in appropriate newspapers: *Provided, also,* That the said Secretary shall not be required to accept any bid which is in his judgment unreasonable in its character.

INDIAN APPROPRIATION ACT FOR THE FISCAL YEAR 1865, ACT OF JUNE 25, 1864, C. 148, 13 STAT. 161, 180

SEC. 2. *And be it further enacted,* That the Secretary of the Interior be, and he is hereby, authorized to expend such part of the amount herein appropriated to carry into effect any treaty stipulation with any tribe or tribes of Indians, all, or any portion of whom, shall be in a state of actual hostility to the government of the United States, including the Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, as well as the Cherokees, as may be found necessary to support such individual members of said tribes as have been driven from their homes or reduced to want on account of their friendship to the United States, and enable them to subsist until they can support themselves in their own country: *Provided,* that an account shall be kept of the sums so paid for the benefit of the said members of said

tribes, which account shall be rendered to congress at the commencement of the next session thereof. And all purchases of articles for the purposes above set forth shall be made of the lowest responsible bidder, after sufficient public notice by advertisement in appropriate newspapers: *Provided, also,* That the said secretary shall not be required to accept any bid which is in his judgment unreasonable in its character: *Provided, further,* That no part of said annuities shall be expended for Indians outside of the Indian Territory south of Kansas, except in providing for such individual Indians or families as are sick and unable to remove to that territory, or such as may be driven out of that territory by armed rebels, after the passage of this act.

INDIAN APPROPRIATION ACT FOR THE FISCAL YEAR 1866, ACT OF MARCH 3, 1865, C. 127, 13 STAT. 541, 562

SEC. 5. *And be it further enacted,* That the Secretary of the Interior be, and he is hereby, authorized to expend such part of the amount herein appropriated to carry into effect any treaty stipulation with any tribe or tribes of Indians, all or any portion of whom shall be in a state of actual hostility to the government of the United States, including the Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, as well as the Cherokees, as may be found necessary to support such individual members of said tribes as have been driven from their homes or reduced to want on account of their friendship to the United States, and enable them to subsist until they can support themselves in thier own country: *Provided,* That an account shall be kept of the sums

so paid for the benefit of the said members of said tribes, which account shall be rendered to congress, at the commencement of the next session thereof, and all the purchases of articles for the purposes above set forth, shall be made of the lowest responsible bidder after sufficient public notice by advertisement in appropriate newspapers: *Provided, also,* That the said Secretary shall not be required to accept any bid which is in his judgment unreasonable in its character: *Provided, further,* That no part of said annuities shall be expended for Indians outside of the Indian Territory south of Kansas, except in providing for such individual Indians or families as are sick and unable to remove to that territory, or such as may be driven out of that territory by armed rebels, after the passage of this act.

ACT OF APRIL 15, 1874, C. 97, 18 STAT. 29

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioner of Indian Affairs, with the sanction of the Secretary of the Interior and the President of the United States, in distributing and paying annuities, interest, or other moneys now due or hereafter to become due to the Seminole tribe of Indians under the provisions of the eighth article of the treaty between the Creek and Seminole Indians and the United States, concluded August seventh, eighteen hundred and fifty-six, shall be authorized to expend the same for such objects as will best promote the comfort, civilization, and improvement of the Seminole Indians, or in his discretion, with the sanction of the Secretary and the President afore-

said, shall be authorized to pay such annuities or any part thereof into the treasury of the Seminole nation to be used as the council of the same shall provide, instead of paying the same per capita according to the terms of said treaty: *Provided,* That said agreement shall provide that the sum of five thousand dollars shall be annually appropriated out of said annuity to the school fund of said tribe: *And provided further,* That the consent of said tribe to such expenditures and payment shall be first obtained.

ACT OF MARCH 2, 1889, C. 412, 25 STAT. 980, 1004

SEC. 12. That the sum of one million nine hundred and twelve thousand nine hundred and forty-two dollars and two cents be, and the same hereby is, appropriated, out of any money in the Treasury not otherwise appropriated, to pay in full the Seminole Nation of Indians for all the right, title, interest, and claim which said nation of Indians may have in and to certain lands ceded by article three of the treaty between the United States and said nation of Indians, which was concluded June fourteenth, eighteen hundred and sixty-six, and proclaimed August sixteenth, eighteen hundred and sixty-six, and which land was then estimated to contain two million one hundred and sixty-nine thousand and eighty acres, but which is now, after survey, ascertained to contain two million thirty-seven thousand four hundred and fourteen and sixty-two hundredths acres, said sum of money to be paid as follows: One million five hundred thousand dollars to remain in the Treasury of the United States to the credit of said nation of In-

dians and to bear interest at the rate of five per centum per annum from July first, eighteen hundred and eighty-nine, said interest to be paid semi-annually to the treasurer of said nation, and the sum of four hundred and twelve thousand nine hundred and forty-two dollars and twenty cents, to be paid to such person or persons as shall be duly authorized by the laws of said nation to receive the same, at such times and in such sums as shall be directed and required by the legislative authority of said nation, to be immediately available; this appropriation to become operative upon the execution by the duly appointed delegates of said nation, specially empowered so to do, of a release and conveyance to the United States of all the right, title, interest, and claim of said nation of Indians in and to said lands, in manner and form satisfactory to the President of the United States, and said release and conveyance, when fully executed and delivered, shall operate to extinguish all claims of every kind and character of said Seminole Nation of Indians in and to the tract of country to which said release and conveyance shall apply, but such release conveyance, and extinguishment shall not inure to the benefit of or cause to vest in any railroad company any right, title, or interest whatever in or to any of said lands, and all laws and parts of laws so far as they conflict with the foregoing, are hereby repealed, and all grants or pretended grants of said lands or any interest or right therein now existing in or on behalf of any railroad company, except rights of way and depot grounds, are hereby declared to be forever forfeited for breach of condition.

ACT OF JUNE 28, 1898, C. 517, 30 STAT. 495, 502

SEC. 19. That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.

* * * * *

INDIAN APPROPRIATION ACT FOR THE FISCAL YEAR 1919, ACT OF MAY 25, 1918, C. 86, 40 STAT. 561, 580

That the Secretary of the Interior be, and he is hereby, authorized to pay to the enrolled members of the Seminole Tribe of Indians of Oklahoma entitled under existing law to share in the funds of said tribe, or to their lawful heirs, out of the Seminole school fund, or any moneys belonging to said tribe in the United States Treasury or deposited in any bank or held by an official under the jurisdiction of the Secretary of the Interior, not to exceed $100 per capita: *Provided,* That said payment shall be made under such rules and regulations as the Secretary of the Interior may prescribe: * * *.

INDIAN APPROPRIATION ACT FOR THE FISCAL YEAR 1920, ACT OF JUNE 30, 1919, C. 4, 41 STAT. 3, 23

* * * That during the fiscal year ending June 30, 1920, no moneys shall be expended from

tribal funds belonging to the Five Civilized Tribes, without specific appropriation by Congress, except as follows: Equalization of allotments, per capita and other payments authorized by law to individual members of the respective tribes, tribal and other Indian schools for the current fiscal year under existing law, salaries and contingent expenses of governors, chiefs, assistant chiefs, secretaries, interpreters, and mining trustees of the tribes for the current fiscal year at salaries at the rate heretofore paid, and one attorney each for the Choctaw, Chickasaw, and Creek Tribes employed under contract approved by the President, under existing law, for the current fiscal year: * * *.

INDIAN APPROPRIATION ACT FOR THE FISCAL YEAR 1921, ACT OF FEB. 14, 1920, C. 75, 41 STAT. 408, 427–428

* * * That hereafter no money shall be expended from tribal funds belonging to the Five Civilized Tribes without specific appropriation by Congress, except as follows: Equalization of allotments, per capita and other payments authorized by law to individual members of the respective tribes, tribal and other Indian schools for the current fiscal year under existing law, salaries and contingent expenses of governors, chiefs, assistant chiefs, secretaries, interpreters, and mining trustees of the tribes for the current fiscal year at salaries at the rate heretofore paid, and one attorney each for the Choctaw, Chickasaw, and Creek Tribes employed under contract approved by the President, under existing law, for the current fiscal year: * * *.

INDIAN APPROPRIATION ACT FOR THE FISCAL YEAR 1922 ACT OF MARCH 3, 1921, C. 119, 41 STAT. 1225, 1243

* * * That the Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes from the tribal funds of those nations, within his discretion and under such rules and regulations as he may prescribe: *And provided further,* That the Secretary of the Interior is hereby empowered, during the fiscal year ending June 30, 1922, to expend funds of the Choctaw, Chickasaw, Creek, and Seminole Nations available for school purposes under existing law for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said tribes. For repair of barn building at Mekusukey Academy, Seminole Nation, Oklahoma, $1,000, payable out of the funds of the Seminole Tribe. * * *

DEPARTMENT OF THE INTERIOR APPROPRIATION ACT FOR THE FISCAL YEAR 1923, ACT OF MAY 24, 1922, C. 199, 42 STAT. 552, 575

* * * That the Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes from the tribal funds of those nations, within his discretion and under such rules and regulations as he may prescribe: * * * That the Secretary of the Interior is hereby empowered, during the fiscal year ending June 30, 1923, to expend funds of the Choctaw, Chickasaw, Creek, and Seminole Nations available for school purposes under existing law for such repairs, improvements, or

new buildings as he may deem essential for the proper conduct of the several schools of said tribes. * * *

DEPARTMENT OF THE INTERIOR APPROPRIATION ACT FOR THE FISCAL YEAR 1924, ACT OF JANUARY 24, 1923, C. 42, 42 STAT. 1174, 1196–1197

* * * That the Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes from the tribal funds of those nations, within his discretion and under such rules and regulations as he may prescribe: * * * That the Secretary of the Interior is hereby empowered, during the fiscal year ending June 30, 1924, to expend funds of the Choctaw, Chickasaw, Creek, and Seminole Nations available for school purposes under existing law for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said tribes. * * *

DEPARTMENT OF THE INTERIOR APPROPRIATION ACT FOR THE FISCAL YEAR 1925, ACT OF JUNE 5, 1924, C. 264, 43 STAT. 390, 398

* * * That the Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes from the tribal funds of those nations, within his discretion and under such rules and regulations as he may prescribe: * * * That the Secretary of the Interior is hereby empowered, during the fiscal year ending June 30, 1925, to expend funds of the Choctaw, Chickasaw, Creek, and Seminole Nations available for school purposes under exist-

ing law for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said tribes: * * *

DEPARTMENT OF THE INTERIOR APPROPRIATION ACT FOR THE FISCAL YEAR 1926, ACT OF MARCH 3, 1925, C. 462, 43 STAT. 1141, 1148–1149

* * * That the Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes from the tribal funds of those nations, within his discretion and under such rules and regulations as he may prescribe: * * * That the Secretary of the Interior is hereby empowered, during the fiscal year ending June 30, 1926, to expend funds of the Choctaw, Chickasaw, Creek, and Seminole Nations available for school purposes under existing law for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said tribes. * * *

DEPARTMENT OF THE INTERIOR APPROPRIATION ACT FOR THE FISCAL YEAR 1927, ACT OF MAY 10, 1926, C. 277, 44 STAT. 453, 460

* * * That the Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes from the tribal funds of those nations, within his discretion and under such rules and regulations as he may prescribe: * * * That the Secretary of the Interior is hereby empowered during the fiscal year ending June 30, 1927, to expend funds of the Choctaw, Chickasaw, Creek, and Sem-

inole Nations available for school purposes under existing law for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said tribes. * * *

DEPARTMENT OF THE INTERIOR APPROPRIATION ACT FOR THE FISCAL YEAR 1928, ACT OF JAN. 12, 1927, C. 27, 44 STAT. 934, 948

The Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes from the tribal funds of those nations, within his discretion and under such rules and regulations as he may prescribe and to expend such funds available for school purposes under existing law for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said tribes.

DEPARTMENT OF THE INTERIOR APPROPRIATION ACT FOR THE FISCAL YEAR 1929, ACT OF MARCH 7, 1928, C. 137, 45 STAT. 200, 216

The Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes from the tribal funds of those nations, within his discretion and under such rules and regulations as he may prescribe and to expend such funds available for school purposes under existing law for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said tribes: *Provided,* That there may be expended from the tribal funds of

the Seminole Nation the sum of $33,000, and from the tribal funds of the Choctaw Nation the sum of $135,000, for educational purposes: * * *

DEPARTMENT OF THE INTERIOR APPROPRIATION ACT FOR THE FISCAL YEAR 1930, ACT OF MARCH 4, 1929, C. 705, 45 STAT. 1562, 1577

For the support of schools and for tuition among the Five Civilized Tribes, there may be expended from tribal funds of such nations $250,000 as follows: Seminole Nation $33,000; * * *

PART IV. MISCELLANEOUS

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE TREASURY,
Washington, D. C., August 23, 1898.

The honorable the SECRETARY OF THE INTERIOR.
Aug. 16, 1898.

SIR: I have received your letter, without date, as follows:

> The Indian appropriation act approved July 1, 1898 (Public, No. 175), makes the following appropriations for the Seminole tribe or nation of Indians:
>
> "For five per centum interest on two hundred and fifty thousand dollars, to be paid as annuity, per *eighth* article of treaty of August seventh, eighteen hundred and *fifty-six,* twelve thousand five hundred dollars;
>
> "For five per centum interest on two hundred and fifty thousand dollars, to be paid as annuity (they having joined their brethren West) per *eighth* article of treaty of August seventh, eighteen hundred and *fifty-six*, twelve thousand five hundred dollars;

"For interest on fifty thousand dollars, at the rate of five per centum per annum, to be paid annually for the support of schools, as per *third* article of treaty of March twenty-first, eighteen hundred and *sixty-six,* two thousand five hundred dollars;

"For interest on twenty thousand dollars, at the rate of five per centum per annum, to be paid annually for the support of the Seminole government, as per *same article, same treaty,* one thousand dollars; in all, twenty-eight thousand five hundred dollars."

The treaty of August 7, 1856, with the Creeks and Seminoles (11 Stat., 699), secured to the said tribes respectively the right of self-government and contained the following stipulations in that connection:

"ARTICLE IV. The United States do hereby solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek or Seminole Tribe of Indians, and that no portion of either of the tracts of country defined in the first and second articles of this agreement shall ever be embraced or included within, or annexed to, any Territory or State, nor shall either, or any part of either ever be erected into a Territory without the full and free consent of the legislative authority of the tribe owning the same.

* * * * *

"ARTICLE XV. So far as may be compatible with the constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government, and full jurisdic-

tion over persons and property, within their respective limits; excepting, however, all white persons, with their property, who are not, by adoption or otherwise, members of either the Creek or Seminole tribe; * * *"

The first two items of appropriation hereinbefore mentioned are in fulfillment of that part of Article VIII, of this treaty, wherein the United States agrees and stipulates with the Seminoles—

"* * * Also to invest for them the sum of two hundred and fifty thousand dollars, at five per cent per annum, the interest to be regularly paid over to them *per capita* as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the two sums so invested shall constitute a fund belonging to the United tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them *per capita* as an annuity; * * *."

The Seminole treaty of March 21, 1866 (14 Stat. 757), contains the following provision respecting the continuation of the tribal government:

"ARTICLE VII. The Seminole nation agrees to such legislation as Congress and the President may deem necessary for the better administration of the rights of person and property within the Indian Territory: *Provided, however,* That said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs."

The last two items of appropriation hereinbefore mentioned are in fulfillment of that part of the third article of the treaty of

March 21, 1866, wherein the United States agreed to pay to the Seminoles the further sum of—

"* * * seventy thousand dollars, to remain in the United States treasury, upon which the United States shall pay an annual interest of five percent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools; the remainder of the seventy thousand dollars, being twenty thousand dollars, shall remain a permanent fund, the interest of which shall be paid annually for the support of the Seminole government; * * *."

As affecting the first two items of appropriation hereinbefore mentioned the act of Congress of April 15, 1874 (18 Stat. 29), provides:

"That the Commissioner of Indian Affairs, with the sanction of the Secretary of the Interior and the President of the United States, in distributing and paying annuities, interest, or other moneys now due or hereafter to become due to the Seminole tribe of Indians under the provisions of the eighth article of the treaty between the Creek and Seminole Indians and the United States, concluded August seventh, eighteen hundred and fifty-six, shall be authorized to expend the same for such objects as will best promote the comfort, civilization, and improvement of the Seminole Indians, or in his discretion, with the sanction of the Secretary and the President aforesaid, shall be authorized to pay such annuities or any part thereof into the treasury of the Seminole nation to be used as the council of the same shall provide, instead of paying the same

per capita according to the terms of said treaty: *Provided*, That said agreement shall provide that the sum of five thousand dollars shall be annually appropriated out of said annuity to the school fund of said tribe: *And provided further*, That the consent of said tribe to such expenditures and payment shall be first obtained."

By the act of the Seminole legislature (also called council) of April 2, 1879, the tribe consented that all annuities then due or thereafter to become due to it under the provision of the 8th article of the said treaty of August 7, 1856, should be paid into the Treasury of the Seminole nation to be used as the council of the same should provide, instead of being paid per capita according to the terms of said treaty, and by said Seminole act it was further provided that the sum of $5,000 should be annually appropriated out of said annuity to the school fund of said tribe. In pursuance of said act of Congress of April 15, 1874, and of the consent of the tribe so given by the act of its legislature, the Commissioner of Indian Affairs, with the sanction of the Secretary of the Interior and the President of the United States, has since April 2, 1879, regularly paid into the treasury of the Seminole nation, to be used as the council of the same should provide, the annuities due to said tribe under the provisions of the 8th article of the said treaty of August 7, 1856, and the sum of $5,000 has annually been appropriated by the said tribe out of said annuity to the school fund of said tribe.

Following the said act of Congress of April 15, 1874, and the Seminole act of April 2, 1879, the Commissioner of Indian Affairs in his discretion, with the sanction of the

Secretary of the Interior and the President of the United States, now desires to pay into the treasury of the Seminole nation as heretofore the annuities named in the first two items of appropriation hereinbefore mentioned, to be used as the council of the same shall provide, if section 19 of the act of Congress of June 28, 1898 (Public, No. 162), entitled "An Act for the protection of the people of the Indian Territory and for other purposes", does not prohibit the further payment of said annuities into the tribal treasury.

Heretofore the money annually appropriated by Congress for the support of the Seminole schools and for the support of the Seminole government, respectively, in fulfillment of the 3d article of the treaty of March 21, 1866, has been paid under the direction of the Secretary of the Interior to the treasurer of said tribe, to be applied to said purposes and expended according to the laws of the tribe, and it is now desired by the Commissioner of Indian Affairs and the Secretary of the Interior that the moneys embraced in the last two items of appropriation hereinbefore mentioned shall now be paid as heretofore to the treasurer of said tribe to be applied to said purposes and expended according to the laws of the tribe, if section 19 of the act of Congress of June 28, 1898, *supra,* does not prohibit the further payment of said moneys to the tribal treasurer.

By act of Congress of March 2, 1889 (25 Stat. 980, 1004), certain moneys were appropriated to pay the Seminoles for the release and conveyance of certain lands, which moneys were to be paid as follows:

"* * * One million five hundred thousand dollars to remain in the Treasury of

the United States to the credit of said nation of Indians and to bear interest at the rate of five per centum per annum from July first, eighteen hundred and eighty-nine, said interest to be paid semiannually to the treasurer of said nation, and the sum of four hundred and twelve thousand nine hundred and forty-two dollars and twenty cents to be paid to such person or persons as shall be duly authorized by the laws of said nation to receive the same, at such times and in such sums as shall be directed and required by the legislative authority of said nation, to be immediately available * * *."

Upon the execution and delivery of the required release and conveyance, the said sum of $412,942.20 was paid to the treasurer of the tribe, he being authorized by a law of the nation to receive the same, and since then the semiannual interest on the said $1,500,000 has been regularly paid "to the treasurer of said nation" to be used, applied, and expended according to the laws of the tribe. An instalment of this interest fell due July 1, 1898, but this Department is not yet advised whether it has been paid to the tribal treasurer or is being withheld pending the consideration of the provisions of section 19 of the act of June 28, 1898, *supra*.

The four items of appropriation for the Seminoles made by the Indian appropriation act of July 1, 1898, *supra,* and the annual interest on the $1,500,000, under the act of March 2, 1889, *supra,* make the total annual income or revenue of the Seminoles from funds held by the United States $103,500.00. Under the laws of that nation or tribe this income or revenue is appropri-

ated, used, applied, and expended in the payment of the expenses of maintaining and conducting the tribal government, including an executive office, a legislature (or council), courts, constabulary, public schools, charitable and penal institutions, public roads, and bridges, etc., the annual appropriation for public schools being $24,000.

The act of Congress of June 28, 1898 (Public No. 162), entitled "An Act for the protection of the people of the Indian Territory and for other purposes", chiefly relates to the affairs and government of the Five Civilized Tribes of Indians in said Territory, the Seminole tribe being one of them. Section 19 of this act provides:

"That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States and the same shall not be liable to the payment of any previously contracted obligation."

This section as it passed the House of Representatives did not contain the words "by the United States" following the words "hereafter be made" in the first part of the section, but did contain the words "all expenses incurred in transacting their business and of" following the words "but payments of" near the middle of the section. In the course of the consideration of the measure in the Senate the section was amended

by inserting the words "by the United States" as above indicated, and by striking out the words "all expenses incurred in transacting their business and of", as above indicated. A copy of the bill, H. R. 8581, as it passed the House of Representatives, with the Senate amendments shown therein, accompanied the letter of the Acting Secretary of the Interior of the 23d ultimo, requesting a ruling by you respecting the payment of certain appropriations made for the Creek Indians.

By act of Congress of July 1, 1898 (Public, No. 172), entitled "An Act to ratify the agreement between the Dawes commission and the Seminole nation of Indians", an agreement negotiated between the Seminoles and the Dawes commission, bearing date December 16, 1897, was ratified by Congress and all laws and parts of laws inconsistent therewith were thereby repealed. This agreement seems to recognize the existing tribal government of the Seminoles and to contemplate a continuance thereof for the time being, although it also seems to contemplate and to be intended to lead up to, an ultimate extinguishment of the tribal government. The effect of this agreement upon existing treaty stipulations is therein stated in these words:

"This agreement shall in nowise affect the provisions of existing treaties between the Seminole nation and the United States except insofar as it is inconsistent therewith."

The only provisions in this agreement regulating the payment of money to the Seminole tribe, are contained in the three following stipulations therein:

"Should there be discovered on any allotment any coal, mineral, coal oil, or natural

gas, and the same should be operated so as to produce royalty, one-half of such royalty shall be paid to such allottee and the remaining half into the tribal treasury *until extinguishment of tribal government,* and the latter shall be used for the purpose of equalizing the value of allotments; and if the same be insufficient therefor, any other funds belonging to the tribe, *upon extinguishment of tribal government,* may be used for such purpose, so that each allotment may be made equal in value as aforesaid.

* * * * *

"Five hundred thousand dollars ($500,000) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five per cent interest, or invested so as to produce such amount of interest, which shall be, *after extinguishment of tribal government,* applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of the Seminole people; * * *

* * * * *

"All moneys belonging to the Seminoles *remaining after equalizing the value of allotments as herein provided* and reserving said sum of five hundred thousand dollars for school funds shall be paid per capita to the members of said tribe in three equal instalments, the first to be made as soon as convenient *after* allotment and *extinguishment of tribal government,* and the others at one and two years, respectively. Such payments shall be made by a person appointed

by the Secretary of the Interior, who shall prescribe the amount of and approve the bond to be given by such person; and strict account shall be given to the Secretary of the Interior for such disbursements."

A question has arisen whether the money due to the Seminole tribe under the Indian appropriation act of July 1, 1898, aforesaid, and the interest on the $1,500,000 under the act of March 2, 1889, aforesaid, can all, or any of it, be now paid into the tribal treasury, as heretofore, or whether such money must be paid out and disbursed "under direction of the Secretary of the Interior by an officer appointed by him" pursuant to section 19 of the act of June 28, 1898, aforesaid.

The Seminole tribe insist that all of said money can be, and should be, paid as heretofore, into the tribal treasury, to be applied and expended according to the laws of the tribe. In this connection the tribe contends:

First, That section 19 only prohibits the payment of money "to any of the tribal governments or to any officer thereof *for disbursement*", and that the word "disbursement", as here employed, means distribution in the sense of a division among the members and does not include the payment of expenses incurred in the course of maintaining and conducting the tribal government. It is claimed that this is shown (a) by the striking out of the words "all expenses incurred in transacting their business and of" from the section as it passed the House of Representatives; (b) by the fact that otherwise construed the two parts of the section are not coextensive or harmonious, the first part of the section withholding all moneys of every kind from the

tribal government and its officers, while the succeeding part of the section only regulates payments to members or per capita payments; in other words, that no provision is made for the payment of the expenses of maintaining and conducting the tribal government to which the moneys are appropriated and applied under the tribal laws, the new and substituted provision for disbursement only applying to payments to members or per capita payments, while the expenses incurred in maintaining and conducting the tribal government are not incurred on the per capita plan and in many instances are to be paid to persons who are not members of the tribe, as in the case of payments to teachers in the public schools; (c) by the fact that contemporaneously with the adoption of section 19, and as a part of the same act (sections 29 and 30), agreements with the Choctaws and Chickasaws and with the Muscogees or Creeks were ratified, containing the following stipulations, respectively:

"That all per capita payments hereafter made to the *members* of the Choctaw or Chickasaw nations shall be paid directly to each individual member by a bonded officer of the United States, under the direction of the Secretary of the Interior, which officer shall be required to give strict account for such disbursements to said Secretary.

"All payments hereafter to be made to the members of the said nation shall be paid directly to each individual member by a bonded officer of the United States, under the direction of the Secretary of the Interior, which officer shall be required to give strict account for such disbursements to the Secretary."

and by the fact that the Seminole agreement ratified almost simultaneously (July 1, 1898) contains a similar provision (hereinbefore quoted), all being limited to a regulation of payments to members or per capita payments—the claim advanced in this connection being that the provisions of these three agreements upon this subject are *in pari materia* with section 19 and all should be construed together, and that so construed section 19 does not include payments which are not otherwise directed by law to be made to members or per capita; (d) by the fact that the following provision of the act of June 7, 1897 (30 Stat. 62, 84):

"That on and after January first, eighteen hundred and ninety-eight, all acts, ordinances, and resolutions of the council of either of the aforesaid Five Tribes passed shall be certified immediately upon their passage to the President of the United States and shall not take effect, if disapproved by him, or until thirty days after their passage: *Provided,* That this act shall not apply to resolutions for adjournment, or any acts, or resolutions, or ordinances in relation to negotiations with commissioners heretofore appointed to treat with said tribes."

was entirely repealed as to the Seminoles by the terms of the agreement with that tribe ratified July 1, 1898, and was repealed as to tribal laws appropriating money for the regular and necessary expenses of the tribal government by the agreements with the Choctaws and Chickasaws and with the Muscogees or Creeks ratified by the act of June 28, 1898, thereby manifesting the intention of Congress to commit to these tribes the full control heretofore exercised over

the expenses of maintaining and conducting the tribal governments.

SECOND. That section 19 does not require that money payable in any other form or manner be changed or converted into payments to members or per capita payments, but only directs that such payments to members or per capita payments as are elsewhere and otherwise provided for by law shall be made under the direction of the Secretary of the Interior, according to the provisions of that section. In this connection the tribe claims that by the action of the tribe and of the Commissioner of Indian Affairs, under the act of April 15, 1874, *supra*, the interest payments provided for by the eighth article of the treaty of August 7, 1856, which include the first two items of appropriation hereinbefore mentioned, were changed and converted from per capita payments into payments for school and other tribal purposes; that the payments of interest provided for by the third article of the treaty of March 21, 1866, which include the last two items of appropriation hereinbefore mentioned, and the payments of interest provided for by the act of March 2, 1889, *supra*, have never been directed to be made to members or per capita but were directed to be made otherwise; and that therefore the pending payments to the Seminole tribe, under the Indian appropriation act of July 1, 1898, and the act of March 2, 1889, do not any of them come within the provisions of section 19.

THIRD. That if section 19, properly construed, applies to the payment of the expenses of maintaining and conducting the tribal governments it is repealed, as to the Seminole tribe, by the subsequent act of

July 1, 1898, ratifying the new agreement with that tribe and repealing "all laws and parts of laws inconsistent therewith", because that agreement, as a whole and in every essential particular, shows that the intent and purpose of Congress and the Seminole tribe was to continue the existing tribal government with all of its official machinery, until the affairs of the tribe are concluded and the tribe is ready to go out of existence.

Because of the importance of the questions presented, and the necessity of having an authoritative decision thereof, I beg that under the provisions of the act of July 31, 1894 (28 Stat. 162, 208), you will decide whether the moneys appropriated for the Seminole tribe, by the Indian appropriation act of July 1, 1898, and the interest money provided for by the act of March 2, 1889, can now, as heretofore, be paid into the tribal treasury, or whether such moneys are now required to be paid or disbursed "under the direction of the Secretary of the Interior by an officer appointed by him", pursuant to the provisions of section 19 of the act of June 28, 1898.

It seems unnecessary to enter into a critical analysis of the language of section 19 of the act of June 28, 1898 (Public, No. 162), for reasons which will presently appear.

The agreement made between the Dawes Commission and the Seminole Indians, December 16, 1897, was ratified by Congress by the act of July 1, 1898 (Public, No. 172). The enacting clause of this act provides:

> That the same be, and is hereby, ratified and confirmed, *and all laws and parts of laws inconsistent therewith are hereby repealed.*

If section 19 of the act of June 28, 1898, is inconsistent with the provisions of the agreement, which was ratified by the act of July 1, 1898, the former has been repealed so far as the Seminole Indians are concerned.

There is a clause in the agreement as follows:

> This agreement shall in nowise affect the provisions of existing treaties between the Seminole Indians and the United States, except insofar as it is inconsistent therewith.

From the foregoing it clearly appears that the rights and duties of the Seminole Indians are to be measured by the provisions of existing treaties construed in the light of and together with the agreement of December 16, 1897.

> This agreement shall be binding on the United States when ratified by Congress and on the Seminole people when ratified by the general council of the Seminole Nation.

The agreement has been ratified by both parties, and, therefore, it will control in the disposition of the question presented.

From the presentation of the case as it appears in your letter it seems to me clear that it was not the intention of the agreement, nor does that instrument in fact deprive the Seminole tribal government of its privilege and duty of disbursing its own funds *prior to the time of the extinguishment of its tribal government,* which extinguishment is evidently contemplated in the near future; therefore, I am of opinion that the moneys due these Indians can be turned over to the tribal authori-

ties for disbursement until such time as the tribal government shall be extinguished.

Respectfully yours,

L. P. MITCHELL,
Assistant Comptroller.
J. D. T.

CCM 7

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE TREASURY,
WASHINGTON, *October 19, 1906.*

The honorable the SECRETARY OF THE INTERIOR.

SIR: I have received your letters of October 8 and 12, 1906 (I. T. D.) in reference to the method of disbursing moneys due the Seminole tribe of Indians. The questions upon which you ask my decision are the following:

1. Whether, under the provisions of sections 11 and 28 of the act of April 26, 1906 (34 Stat. 137), expenditures from the tribal funds and distribution of annuities arising therefrom to members of the Seminole tribe should be made by the tribal authorities of the Seminole Nation or under the direction of the Secretary of the Interior.

2. Whether the Secretary of the Interior is authorized, under section 10 of the act of April 26, 1906 (34 Stat. 137), to refuse to turn over the interest due the Seminole Nation from its school funds to its tribal authorities, and to retain the same to be used under the direction of the Secretary in defraying the expenses of schools in the Seminole Nation.

The act referred to is entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes." Sections 10, 11, 28, and 29, so far as they affect the questions are as follows:

> SEC. 10. That the Secretary of the Interior is hereby authorized and directed to assume control and direction of schools in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, with the lands and all school property pertaining thereto, March fifth, nineteen hundred and six, and to conduct such schools under rules and regulations to be prescribed by him, retaining tribal educational officers, subject to dismissal by the Secretary of the Interior, and the present system so far as practicable, until such time as a public-school system shall have been established under Territorial or State government, and proper provision made thereunder for the education of the Indian children of said tribes, and he is hereby authorized and directed to set aside a sufficient amount of any funds, invested or otherwise, in the Treasury of the United States, belonging to said tribes, including the royalties on coal and asphalt in the Choctaw and Chickasaw nations, to defray all the necessary expenses of said schools, using, however, only such portion of said funds of each tribe as may be requisite for the schools of that tribe, not exceeding in any one year for the respective tribes the amount expended for the scholastic year ending June thirtieth, nineteen hundred and five; * * *.
>
> SEC. 11. That all revenues of whatever character accruing to the Choctaw, Chicasaw, Cherokee, Creek, and Seminole tribes,

whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. All such claims arising before dissolution of the tribal governments shall be presented to the Secretary of the Interior within six months after such dissolution, and he shall make all rules and regulations necessary to carry this provision into effect and shall pay all expenses incident to the investigation of the validity of such claims or indebtedness out of the tribal funds: * * *.

SEC. 28. That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: *Provided,* That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: *Provided further,* That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of

them or by any officer thereof shall be of any validity until approved by the President of the United States.

SEC. 29. That all Acts and parts of Acts inconsistent with the provisions of this Act be, and the same are hereby, repealed.

In the decision of this office, dated August 23, 1898 (7 MS. Dec. 350), it was held that section 19 of the act of June 28, 1898 (30 Stat. 502), requiring that no moneys on any account whatever should be paid to tribal authorities, but be paid out under the direction of the Secretary of the Interior, did not apply to the Seminoles. The reason for that holding was that the later act of July 1, 1898 (30 Stat. 567), ratifying and confirming an agreement with the Seminoles, expressly repealed all laws and parts of laws inconsistent with the later act. It was therefore further held that the act of June 28, 1898, *supra*, did not deprive the Seminole tribal government of its privilege and duty of disbursing its own funds prior to the extinguishment of its tribal government.

The act of April 26, 1906, *supra*, by section 28, specifically continues the tribal existence and present tribal governments of the Five Civilized Tribes and naming each of them.

Your first question can only be answered by considering whether section 11 of the act of 1906 does deprive the Seminole tribal government of its right to disburse its own funds while the tribal government continues, a right which the Controller held was preserved in the agreement between the United States and the Seminoles, ratified July 1, 1898.

Under treaties of August 7, 1856, and March 21, 1866, the Seminoles are entitled to appropriations

of $28,500 each year, being the interest at five per centum per annum on $570,000. Such appropriations are made from year to year. By the act of March 2, 1889 (25 Stat. 1004), it was provided that $1,500,000, a part of the price of lands purchased by the United States from the Seminoles, should remain in the Treasury and five per centum per annum thereon should be paid semiannually to the treasurer of the Seminole Nation. By the agreement which was ratified in the act of July 1, 1898 (30 Stat. 567), it was provided that:

> Five hundred thousand dollars ($500,000) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five percent interest, or invested so as to produce such amount of interest, which shall be, after extinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of the Seminole people.

By the act of April 15, 1874 (18 Stat. 29), it was provided that the annual payment of $25,000 under the treaty of 1856 might be paid into the treasury of the Seminole Nation to be used as the council of the Nation should provide, if the tribe consented thereto and agreed to appropriate $5,000 annually for the school fund. This consent and agreement was given and made by the Seminoles.

An examination of the language in the first sentence in section 11 of the act of April 26, 1906, *supra,* makes it clear that the revenues accruing

to the tribes, which revenues are to be collected by an officer appointed by the Secretary of the Interior, do not include the interest on moneys of the Seminole tribe in the Treasury of the United States. By treaty, law, and agreement with the Seminoles such interest is required to be paid into the tribal treasury. Neither the act of 1906, nor earlier laws, make specific provision for the distribution of the interest money among the members of the tribe. There is, in my opinion, no authority in section 11 for the Secretary to make distribution of annuities arising from tribal funds to members of the Seminole tribe. Neither from the language of the section, nor by implication, can such authority be found. Nor is there authority in that section for the Secretary to apply such interest to the payment of any obligations except lawful claims against the tribe contracted after July 1, 1902, or for which warrants have been regularly issued. As to such claims and such warrants full authority is given to the Secretary of the Interior to use any fund in the United States Treasury belonging to the tribe to make payment, and that authority continues as to claims contracted or warrants issued prior to dissolution of the tribal government.

In answer to your first question, I am of the opinion that expenditures from the tribal funds, and distribution of annuities arising therefrom to members of the Seminole tribe should be made by the tribal authorities of the Seminole Nation, subject, however, to the approval of the President so far as required by section 28 of the act; and except as the right and duty is devolved upon you to

disburse so much of the funds as is necessary to carry out the requirements of section 11 as to payment of lawful claims and warrants, and to carry out the requirements of section 10 as to schools.

I answer your second question in the affirmative. Section 10 of the act of April 26, 1906, contains specific authority and direction for you to assume control and direction of the schools in the Seminole tribe, and to use the money of the tribe, invested or otherwise, in the Treasury of the United States, not exceeding in any one year the amount expended for the scholastic year ended June 30, 1905.

I have not overlooked the briefs you forwarded and the argument made by counsel for the Seminoles, that the treaties and agreements made by the United States are contracts which cannot be modified by Congress without the consent of the tribe, and that Congress cannot dispose of the moneys and property of the tribe at will.

I have not discust this question because, so far as the Controller is concerned, the plain requirements of the latest act of Congress are to be followed. Such an act may repeal an earlier act or a treaty. Whether the later act invades property rights of the tribe, or annuls contracts and confiscates Seminole property, as is contended, is not a question for my decision. Nor has the Controller authority to right such wrongs if they exist or give compensation therefor.

I have, however, given full weight to the principle that an Act of Congress should not be construed to repeal in whole or in part a treaty right unless such a construction is required by the language used in such act.

I return the letters and papers which you transmitted.

Respectfully,

R. J. TRACEWELL,
Comptroller.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE ASSISTANT ATTORNEY-GENERAL,
Washington, July 12, 1898.

THE SECRETARY OF THE INTERIOR.

SIR: By your communication of July 9, 1898, I am asked for an opinion whether section 19 of an act of Congress approved June 28, 1898 (Public, No. 162), entitled "An act for the protection of the people of the Indian Territory, and for other purposes", applies to the Seminole Nation of Indians.

Said section is as follows:

> That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.

It is submitted that until the passage of this act it had been the practice of this Department, under the laws and regulations then in force, to deposit "such funds" in bulk with the Assistant

Treasurer of the United States, at St. Louis, to the credit of the treasurers of "these tribes", to be disbursed by them in their own way, under the laws of their respective nations.

By the expression "such funds" and "these tribes", used in your communication, I take it is meant moneys due any of the five civilized tribes from the United States government. The practice of this Department, therefore, has been to deposit any moneys, subject to disbursement on account of these tribes, with the Assistant Treasurer, at St. Louis, to the credit of the treasurers thereof, to be disbursed by them without the further supervision of the government.

Section one of the act, *supra,* provides that the word "officer", where the same appears in the criminal laws theretofore extended over and put in force in the Indian Territory, shall include all officers "of the several tribes or nations of Indians in said Territory."

Section 2 authorizes and requires the Judge of a United States Court of any district in said Territory to make "any tribe" of Indians a party to any suit pending in his court where it appears that the property of such tribe is in any way affected by the issues being heard.

Section 3 confers jurisdiction on the United States district courts in said Territory to try cases against persons who claim to hold lands and tenements as members of a tribe, and whose membership is denied by the tribe, and provides that "if it be found upon trial that the same are held unlawfully against the tribe by those claiming to be members thereof, and the membership and right

are disallowed by the commission to the *Five Tribes,* or the United States court * * * then said court shall cause the parties charged with unlawfully holding said possessions to be removed from the same and cause the lands and tenements to be restored to the person or persons or nation or tribe of Indians entitled to the possession of the same."

Section 4 provides "That all persons who have heretofore made improvements on lands belonging to any one of the said tribes of Indians" may under certain conditions sell and dispose of the same.

Section 11 provides for the allotment of lands when the roll of citizenship of "any one of said nations or tribes" is fully completed.

Section 15 provides, "That there shall be a commission in each town for each one of the Chickasaw, Choctow, Creek and Cherokee tribes", who shall cause to be surveyed and laid out townsites.

Section 16 makes it unlawful for any person to claim, demand, or receive any royalty or rents on any lands or property belonging to "any one of said tribes or nations in said Territory."

Section 17 provides that it shall be unlawful for "any citizen of any one of said tribes" to hold possession of more than his approximate share of the allotted lands.

It is apparent from these excerpts from the act that section 19 prohibits the payment by the United States of moneys on any account whatever to officers or tribal governments of *any* of the five civilized tribes.

The Seminole Indians, as such, are nowhere mentioned in the act, but these Indians constitute one

of the five civilized tribes, and are within the inhibition of said section, unless, as to them, it has been repealed by subsequent legislation.

An act approved July 1, 1898 (Public, No. 172), ratified the agreement of December 16, 1897, between the Dawes Commission and the Seminole Nation of Indians. One of the stipulations of that agreement was, that:

> All moneys belonging to the Seminoles remaining after equalizing the value of allotments as herein provided, and reserving said sum of five hundred thousand dollars for school fund, shall be paid per capita to the members of said tribe in three equal instalments, the first to be made as soon as convenient, after allotment and extinguishment of the tribal government. Such payments shall be made by a person appointed by the Secretary of the Interior, who shall prescribe the amount of and approve the bond to be given by such person; and strict account shall be given to the Secretary of the Interior for such disbursements.

The act *supra,* which ratifies and confirms this agreement, repeals "all laws and parts of laws inconsistent therewith."

There is nothing in the language quoted inconsistent with the provisions of section 19 of the act of June 28, 1898, *supra.* Indeed, these provisions in the two acts are substantially the same. The provision in the Seminole act that "all moneys belonging to the Seminole Indians * * * shall be paid *per capita* to the members of said tribe", the first payment to be made after the "extinguishment of tribal government" "by a person appointed

by the Secretary of the Interior", is the substantial equivalent of the language used in the general act that payments shall not be made "to any of the tribal governments or any officer thereof", but shall be made per capita direct to each individual, "under direction of the Secretary of the Interior by an officer appointed by him."

I have therefore to advise that section 19 of the act of June 28, 1898, applies to the Seminole Nation of Indians. Moreover, it results from what has been hereinbefore said that whether that act applies or not, the manner of disbursement under the Seminole act must be the same.

Very respectfully,

WILLIS VAN DEVANTER,
Assistant Attorney General.

DEPARTMENT OF THE INTERIOR,
July 12, 1898.

Approved:
THOS. RYAN,
Acting Secretary.

CONGRESSIONAL RECORD, 55TH CONGRESS, 2ND SESSION, VOL. 31, PART IV, PAGE 3869 (APRIL 14, 1898)

As introduced, the Curtis Bill (H. R. 8581, 55th Congress) provided in Section 19 as follows:

> That no payment of any moneys on any account whatever shall hereafter be made to any of the tribal governments or to any officer thereof for disbursement, but payments of all expenses incurred in transacting their business and of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments

shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.

GENERAL ACCOUNTING OFFICE REPORT, PAGE 152

Disbursement Schedule No. 42—Continued

Treaty of August 7, 1856, 11 Stat. 699	Fiscal year		
	1870	1871	1872
ARTICLE 8			
Per capita payments	$19,679.00	$12,500.00	$12,374.55
Cash payments to individuals	* 17,821.00		
MISCELLANEOUS ITEMS			
Pay of miscellaneous employees			74.10
Total	37,500.00	12,500.00	12,448.65

(Continued on next page.)

* Authorized to be paid out of annuity money by an act of the General Council of the Seminole Nation, dated April 8, 1870. (Settlement No. 7243-1870.)

GENERAL ACCOUNTING OFFICE REPORT, PAGE 153

Disbursement Schedule No. 42—Continued

Treaty of August 7, 1856, 11 Stat. 699	Fiscal year		
	1873	1874	1875
ARTICLE 8			
Per capita payments	$12,401.00		$25,082.25
Payment of drafts on Seminole Nation		* $11,101.64	
Cash payments to Seminole Treasurer		13,898.42	
Total	12,401.00	25,000.06	25,082.25

(Continued on next page.)

* Authorized to be paid out of annuity money by an act of the General Council of the Seminole Nation, dated April 28, 1874. (Settlement No. 5968-1874.)

GENERAL ACCOUNTING OFFICE REPORT, PAGE 154

Disbursement Schedule No. 42—Continued

Treaty of August 7, 1856, 11 Stat. 699	Fiscal year		
	1876	1877	1878
ARTICLE 8			
Per capita payments		$36,381.00	$24,924.90
Expenses of delegations	$500.00		
Cash payment to Seminole Treasurer		590.50	75.10
Total	500.00	36,971.50	25,000.00

(Continued on next page.)

GENERAL ACCOUNTING OFFICE REPORT, PAGE 155

Disbursement Schedule No. 42—Continued

Treaty of August 7, 1856, 11 Stat. 699	Fiscal year		
	1879	1880	1881
ARTICLE 8			
Per capita payments	$12,046.00		
Cash payments to Seminole Treasurer	12,500.00	$25,454.00	$25,000.00
Total	24,546.00	25,454.00	25,000.00

(Continued on next page.)

GENERAL ACCOUNTING OFFICE REPORT, PAGE 156

Disbursement Schedule No. 42—Continued

Treaty of August 7, 1856, 11 Stat. 699	Fiscal year		
	1882	1883	1884
ARTICLE 8			
Cash payments to Seminole Treasurer	$25,028.60	$25,182.29	$25,000.00
Total	25,028.60	25,182.29	25,000.00

(Continued on next page.)

GENERAL ACCOUNTING OFFICE REPORT, PAGE 308

ABSTRACT NO. 10

Abstract of disbursements made by the United States for the benefit of the Seminole Nation of Indians from moneys appropriated pursuant to and in connection with the Treaties of August 7, 1856, 11 Stat. 699, and March 21, 1866, 14 Stat. 755, during the period from July 1, 1907, to June 30, 1930.

Schedule No.	Name of appropriation or fund	Amount disbursed
57	Fulfilling Treaties with Florida Indians, or Seminoles	(a) $71, 250. 00
58	Interest on Seminoles of Oklahoma Fund	(b) 204, 780. 00
59	Seminoles of Oklahoma Fund	(c) 570, 050. 00
	Total	(d) 846, 080. 00

(a) See page 24, Item (p).
(b) See page 307, Item (b).
(c) See page 306, Item (c).
(d) See page 305, Item (b); also page 5, Item (j).

GENERAL ACCOUNTING OFFICE REPORT, PAGE 309

DISBURSEMENT SCHEDULE NO. 57

Disbursements made by the United States for the benefit of the Seminole Nation of Indians under the appropriation:

Fulfilling Treaties with Florida Indians, or Seminoles [a]

	Fiscal year		
	1908	1909	1910
Administrative expenses, Seminole National Government	$42, 747. 00	$11, 002. 96	
Per capita payments			$15, 200. 00
Total	42, 747. 00	11, 002. 96	15, 200. 00

(Continued on next page)
[a] For dates of appropriation acts, statute references and amounts appropriated, see pages 326 to 329.

GENERAL ACCOUNTING OFFICE REPORT, PAGE 310

Disbursement Schedule No. 57—Continued

	Fiscal year		Total
	1919	1921	
Administrative expenses, Seminole National Government			$53,749.96
Per capita payments	$2,100.00	$200.04	17,500.04
Total	2,100.00	200.04	71,250.00

U. S. GOVERNMENT PRINTING OFFICE: 1938

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 172.

THE UNITED STATES, PETITIONER,

VS.

THE SEMINOLE NATION, RESPONDENT.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

PAUL M. NIEBELL,
W. W. PRYOR,
Attorneys for Respondent.

E. L. MENDENHALL, INC., 6 WEST 9TH ST., KANSAS CITY, MO.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 172.

THE UNITED STATES, PETITIONER,

VS.

THE SEMINOLE NATION, RESPONDENT.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

Before answering the questions presented by petitioner, the respondent will first present a question of the court's jurisdiction to consider this petition.

JURISDICTIONAL QUESTION.

The respondent opposes the petition for writ of certiorari on the ground that it was filed too late, and therefore this court is now without jurisdiction to consider the petition.

The record of the proceedings below shows that the judgment of the Court of Claims was rendered on December 2nd, 1935 (Rec. 29). The defendant below filed a motion for a new trial on February 8, 1936 (Rec. 30). This motion was overruled on March 2, 1936 (Rec. 30), and the time for filing the petition for writ of certiorari began to run from this date.

A period of three months is allowed in which to make application for writ of certiorari. Section 8 (a) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940 (U. S. C., Title 28, Sec. 350), provides in part as follows:

> "No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *"

Under this statute the time for filing the petition expired on June 2nd, 1936. The petitioner failed to make its application to this court within the time allowed by the above statute. This court has held that failure to file the petition until after the expiration of the three months' period deprives the court of jurisdiction to consider the petition. *Rust Land & Lumber Co.* v. *Jackson*, 250 U. S. 71, 76; *United States* v. *Lippmann, Spier & Hahn*, 260 U. S. 739; *Hooper* v. *United States*, 274 U. S. 743.

Petitioner evidently relies upon the further proceedings in the court below, as a basis for its action in pre-

senting the petition for writ of certiorari at this late date. In its statement of jurisdiction (Pet. 1) petitioner reviews the proceedings in the court below as follows:

> "The judgment of the Court of Claims was entered December 2, 1935. A motion for a new trial was made February 6, 1936, and was denied March 2, 1936. A second motion for a new trial was filed, with leave of the Court of Claims, on May 13, 1936, was orally argued June 1, 1936, and was denied June 8, 1936. * * *"

After the first motion for a new trial was overruled by the court below this case was sent to the solicitor-general's office with a view of making application for a writ of certiorari to this court. However, in lieu of filing its petition within the 90-day period, ending on June 2, 1936, petitioner, defendant below, on May 13, 1936, filed in the court below a motion for leave to file a motion for a new trial under Section 1088, Revised Statutes, Judicial Code, Section 175 (U. S. C., Title 28, Sec. 282). This motion reads as follows (Rec. 30):

> "Comes now the defendant, by its assistant attorney-general, and pursuant to R. S., Sec. 1088, Judicial Code, Sec. 175, U. S. C., Title 28, Sec. 282, respectfully prays leave to file the attached motion for a new trial in this case."

Let us impress upon the court that the only leave asked for and granted by the Court of Claims to petitioner was that it file a motion for a new trial under said Section 1088, Revised Statutes.

The lower court allowed this motion on May 18th, 1936, and the motion for a new trial under said Section 1088 was filed on May 18th, 1936 (Rec. 30). This motion, though designated as a second motion for a new trial, was in fact a first motion for new trial under Section 1088, Revised Statutes. After oral argument, in which the solicitor-general's office was represented by Mr. Charles E. Wyzanski, Jr., this motion was overruled by the court on June 8th, 1936 (Rec. 30).

The petitioner's right to file this petition either stands or falls on the effect of the filing of its motion for a new trial under said Section 1088. This section provides as follows:

> "The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion, on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States, but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law." (R. S., Sec. 1088; Mar. 3, 1911, c. 231, Sec. 175, 36 Stat. 1141, U. S. Code, Title 28, Sec. 282.)

In commenting upon the nature of motions filed under said Section 1088, in *The Electric Boat Co.* v. *United States,* 55 C. Cls. 497, 498, the court states as follows:

"* * * Nor is the motion for a new trial under the rules of the court the same as a motion under Section 175, Judicial Code.

* * * * * * *

"The motion contemplated by Section 175, Judicial Code, is largely analogous to a bill in the nature of a bill of review in equity to set aside a former decree, or a bill impeaching a decree for fraud. *Ex parte Russell*, 13 Wall. 664, 669. * * *"

In discussing the effect of the filing of a motion for a new trial under said Section 1088, Hughes Federal Practice, Par. 5193 (p. 464), states:

"While granting a new trial in the court of claims deprived the Supreme Court of jurisdiction on appeal, the mere making of a motion therefor did not deprive that court of jurisdiction to consider the appeal." *United States* v. *Ayres*, 9 Wall. 608, 19 L. Ed. 625; *Ex parte Russell*, 13 Wall. 664, 20 L. Ed. 632; *Ex parte United States*, 16 Wall. 699, 21 L. Ed. 507.

Therefore, the mere filing of a motion for a new trial under said Section 1088 would not interfere with the regular judicial procedure in a case.

It is well settled that no appeal lies from the decision of the Court of Claims on a motion filed under said Section 1088. In the case of *Young* v. *United States*, 95 U. S. 641, 643, this court stated:

"* * * We are all of the opinion that the decision of the Court of Claims, upon a motion by the United States, within the prescribed jurisdiction, is conclusive, and not subject to review. The claimant must rely upon his appeal from the final judgment upon the merits for protection against wrong under this form of proceeding."

The proceedings after judgment in the case of *Pocono Pines Assembly Hotels Co.* v. *United States*, 73 C. Cls. 447, are similar in many respects to the case at bar. In that decision (p. 463) the Court of Claims, after reviewing the decisions of that court under said Section 1088, states as follows:

> "* * * Our determination in this respect is final under the law; no appeal may be predicated thereon. *Young* v. *United States*, 95 U. S. 641.
>
> "The government, however, possessed the right under Section 3 of the Act of February 13, 1925 (43 Stat. 939), to petition the Supreme Court for a writ of certiorari to review our decision, and Section 8 (a) of the act allowed ninety days in which to do so. The government did not file a petition for a review, and hence the judgment of this court became final at the expiration of the ninety-day period."

In the case at bar the petitioner did not file its petition for writ of certiorari on or before June 2, 1936, the date upon which the ninety days allowed by statute expired, but elected to file a motion for a new trial in the lower court under Section 1088, Revised Statutes, which was overruled by the court. As the time for applying for certiorari has expired, and there being no appeal from the decision of the lower court on said motion under Section 1088, Revised Statutes, it is respectfully submitted that this court is now without jurisdiction to consider the petition.

STATEMENT OF CASE.

We will briefly outline the issue in this case for the court.

The special jurisdictional Act of May 20, 1924, c. 162, 43 Stat. 133, 134, authorizes the Court of Claims to adjudicate:

> "any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian Affairs."

The cause of action was the illegal disbursement by the Secretary of the Interior of respondent's funds arising under its treaties and agreements, and the illegal disbursement of respondent's funds made in violation of various acts of Congress governing their disbursement.

The nature of this case is concisely stated in the opinion of the court below as follows (Rec. 16):

> "* * * The claim is one of accounting, except as to one item, and in the main is similar to the claim presented in *The Creek Nation* v. *United States,* 78 C. Cls. 474.
>
> * * * * * * *
>
> "The plaintiff's claim in the aggregate amounts to $1,746,013.23, and consists of items falling generally within two classes:
>
> 1. Items as to which it is alleged that the United States failed to make payments in the amounts and in the manner provided by its treaties and agreements with the Seminole Nation.

2. Items as to which it is alleged payments were made by the Secretary of the Interior out of Seminole trust funds without authority of law."

THE PRINCIPLES OF LAW APPLIED BY LOWER COURT.

The law governing items of the claim under Class 1 above stated is set out by the court as follows (Rec. 23):

> "In determining the plaintiff's right to recover as to these items, we have applied the rule that an Indian tribe is entitled to have the full amount due it under the terms of a treaty with the United States disbursed in the manner and for the precise purposes named in the treaty, unless Congress by subsequent legislation provides that payments be otherwise made, and that the United States is liable to the tribe for the balance of any moneys not so disbursed and expended."

The law governing items of the claim under Class 2 above stated is set out by the court as follows (Rec. 23):

> "We now come to the consideration of the items of the claim where it is alleged disbursements of Seminole trust funds were made by the Secretary of the Interior without authority of law. In the consideration of these items the rule stated in *The Creek Nation* v. *United States, supra,* will be applied:
>
> 'That Congress has plenary power over the administration of Indian affairs is well settled. *Cherokee Nation* v. *Georgia,* 5 Pet. 1; *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294; *Lone Wolf* v. *Hitchcock,* 187 U. S. 553. The Secretary of the Interior has only such authority over the funds of Indian tribes as is confided in him by Congress. He cannot legally disburse and pay out Indian funds for purposes other than those authorized by law. This rule is the test

by which the legal right of the Secretary of the Interior to make the disbursements involved must be determined.' "

The above principles of law cover this whole case, and are applied to all items of the claim.

REPLY TO PETITIONER'S QUESTIONS.

On page two of its petition, petitioner gives the "questions presented." We will answer these in the order given.

Petitioner's First Question.

"1. Whether the claims adjudicated by the Court of Claims were presented to it for decision in the time within which the United States had consented to be sued."

The reason for this contention is stated as follows:

"1. Departing from the usual and accepted course of judicial proceedings, the lower court erroneously allowed the Seminoles, after the time for bringing suit had expired, to amend their petition to present for adjudication causes of action not included in their original petition" (Pet. 15).

Petitioner then argues that the lower court erred (1) in granting recovery for illegal disbursements of treaty funds before July 1, 1898, because the original petition sought recovery only for illegal disbursements after this date, and (2) that recovery for illegal disbursements of the income of certain trust funds only was sought therein.

To uphold the first contention of petitioner Paragraphs II and VII (Rec. 1, 2) of the original petition would have to be disregarded altogether. The general allegations in these paragraphs, coupled with those in Paragraph VIII, show clearly that plaintiff sought recovery for illegal disbursements under treaties and agreements before July 1, 1898, which is the first period covered by the claim. Paragraph II alleges "That at all times mentioned herein, and for many years prior thereto," plaintiff was owner of large trust funds, held in trust by defendant for the use and benefit of plaintiff, and that there existed various treaties and agreements between plaintiff and defendant whereby said trust funds were to be managed and invested by defendant, and the interest thereon paid over to the national treasurer of plaintiff.

The use of the word "treaties" shows that our claim antedates July 1, 1898, for no more treaties could be made with an Indian tribe after the passage of the Act of March 3, 1871, c. 120, 16 Stat. 544, 566 (Rev. Stat., Sec. 2079). The use of this term clearly shows that our claim antedates the year 1871, and is so all-inclusive that it would embody any treaty between the plaintiff and the United States prior to the passage of this act. After the Act of March 3, 1871, agreements only could be made with an Indian tribe. We used the term "agreements," signifying that the claim includes any agreements made after the Act of March 3, 1871.

Paragraph VII states as follows:

> "That at all times mentioned herein a certain act of Congress, now known as Section 2097, Revised

Statutes of the United States, was in full force and effect. That said section is as follows:

'No funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner not authorized by such treaty, or by express provisions of law; nor shall money appropriated to execute a treaty be transferred or applied to any other purposes, unless expressly authorized by law' '' (Rec. 2).

Section 2097, Revised Statutes, was in full force and effect since its passage on July 26, 1866, c. 266, 14 Stat. 255, 280, and applies up to the time of the Curtis Act, when a new order of affairs was established. This allegation shows clearly that our claim for illegal disbursements antedates July 1, 1898.

All moneys claimed before July 1, 1898, had been appropriated by Congress in fulfillment of treaties and agreements with plaintiff (Rec. 11-13), but were not disbursed by defendant below in the manner so provided in said treaties and agreements. Therefore, these illegal disbursements were also made in violation of said Section 2097, and the allegation in Paragraph VII would cover most of the items of illegal disbursement before July 1, 1898, upon which recovery was had in the amended petition.*

The second contention is equally without merit. That petitioner is guardian of respondent, the Seminole Nation, is well settled, and any moneys due under treaties and agreements which were to have been disbursed by petitioner for the benefit of respondent would be trust

*Section 2097 is referred to by the lower court in its opinion with reference to Item 3 (Rec. 20).

funds in the general sense, and the general allegations of the original petition show that trust funds were not used in the narrow sense as suggested by petitioner, but in the general sense. Then, too, the broad language of Section 2097, above quoted, shows that this provision applies to all treaty funds, whether trust funds in a narrow sense, or general treaty funds.

The second period of our claim begins with the Curtis Act, for under this act the United States assumed full administrative control of the affairs of plaintiff tribe. Paragraphs III to VI, inclusive, of the original petition allege violations of the terms of treaties and agreements, and other acts of Congress, beginning with July 1, 1898, as the result of which defendant illegally spent plaintiff's funds. Violations of Section 19 of the Curtis Act, and the illegal disbursement of the principal of the permanent Seminole school fund come within this period.

Paragraph VI of the original petition states:

> "That from July 1st, 1898, until the present time, defendant, in violation of its duty as trustee of the funds of plaintiff, in violation of the rights of plaintiff under its various treaties and agreements with defendant, and without authority of Congress, has spent large sums of the trust funds of plaintiff" (Rec. 2).

Certain allegations are pointed out by petitioner to show an inconsistency between the original petition and the amended petition in the claim for illegal disbursements under Section 19 of the Curtis Act (Pet. 18, 19). No claim for the $1,500,000.00 trust fund income before July 1, 1898, was presented in the original petition, but

this income was a part of the claim *after* July 1, 1898, for illegal disbursements in violation of Section 19 of the Curtis Act. This item has no connection with Paragraph II of the original petition, notwithstanding petitioner's suggestion to the contrary (Pet. 18), but comes within the second period of our claim, which is covered by Paragraphs III to VI, inclusive, of the original petition.

The allegation in Paragraph II of the original petition alluding to payments of interest to plaintiff's national treasurer, and the allegation in Paragraph III that after the Curtis Act defendant refused to further make payments to plaintiff's national treasurer, have no relation to each other, as petitioner would lead the court to believe. These allegations were incidental to the claim, and were merely descriptive of the two separate periods or "eras" of the claim—before and after the Curtis Act (Rec. 23, 24). No claim was made for moneys *lawfully* turned over to plaintiff's treasurer before the Curtis Act, and no claim was made for moneys which defendant *refused* to turn over to plaintiff's treasurer after the Curtis Act. The claim under Section 19 was for illegal disbursements to the tribal officers in violation of said Section 19, which were made after July 1, 1898, "without authority of Congress," as alleged in Paragraph VI of the original petition. Therefore, the above allegations, being incidental to the main cause of action, furnish no basis for petitioner's contention that the claim for illegal disbursements under Section 19, set forth in the amended petition, is foreign to the general claim for said illegal disbursements in Paragraphs III to VI of the original petition.

The petitioner's contention is not so much a question of the court's jurisdiction, as it is a question of pleading, for the original petition was filed within the time allowed by the jurisdictional act as amended (Rec. 10). The contention, in effect, is that in a case wherein a fiduciary relationship exists between the parties and the facts are within the sole knowledge of defendant, the law requires precise allegations and will not permit general allegations in a petition for accounting. We do not believe that this contention can be sustained.

The original petition was, of necessity, couched in general terms, for it requested an accounting of defendant of disbursements under treaties and agreements, and for the period beginning with the Curtis Act. When this petition was filed the law was unsettled—a similar case in principle had not been decided (*The Creek Nation* v. *United States*, 78 C. Cls. 474)—and the details of the items of illegal disbursement were within the records and files of defendant. Paragraph VIII of the petition alleges:

> "That the defendant has thus spent, in violation of law, a large amount of the trust funds of plaintiff. That the exact amount of such expenditure will be shown by the books and records of defendant, and that such knowledge is in the possession of defendant, and not of plaintiff.
>
> "Wherefore, plaintiff prays that defendant be required to file in this cause a statement showing its expenditures of plaintiff's funds during said period, the purposes for and dates when such expenditures were made, and the authority of law, if any, which authorized defendant to make such expenditures; that, if necessary thereafter, plaintiff be permitted to amend this petition, and that plaintiff have judg-

ment against the defendant in such sum or sums as appear to this court to be expended without authority of law, with interest at six per centum per annum from the date of the expenditure of the several items constituting said sum" (Rec. 2, 3).

Therefore, in the light of the knowledge plaintiff then had, a skeleton petition was filed under Rule 12 of the court below then in force (Rule 14, Revised Rules), which reads as follows:

> "12. When the plaintiff cannot state his case with the requisite particularity without an examination of papers in one of the executive departments and has been unable to obtain a sufficient examination of such papers on application he may file a petition stating his claims, as far as is in his power, and specifying, as definitely as he can, the papers he requires, and thereafter may file a motion for a call upon the proper department for such information or papers as may be deemed necessary, and when the same are furnished the petition may be amended and take the place of the original petition."

It is apparent to the court that the general accounting requested was the essence of the petition. As was said in *Green* v. *Brooks*, 22 P. 849, 851:

> "The very object of an accounting may be, and frequently is, to ascertain how much has been realized and expended, so as to determine whether the *cestui que* trust is entitled to payment."

The rules of pleading are liberal in cases wherein a fiduciary relationship exists, and it is well settled that in a petition for a general accounting:

> "When existence of the fiduciary relationship and receipt of property thereunder by defendant are

> alleged, and nothing is stated barring the right of relief, the complaint is sufficient'' 65 C. J. 902.

And again:

> "Where matters essential to the determination of claims by complainant in a bill for an accounting are charged to rest in the knowledge of defendant, or must of necessity be within his knowledge, and are consequently the subject of a part of the discovery sought by the bill, precise allegations thereof are not required." 1 C. J. 635; *State* v. *Ill. Cent. R. Co.*, 246 Ill. 188, 92 N. E. 814, 835.

Nor under the rules of pleading is it necessary to plead the particular recovery the court awards. In the case of *Electric Boat Co.* v. *United States*, 66 C. Cls. 333, 377, in commenting upon the rules of pleading in the Court of Claims, Mr. Chief Justice Booth states:

> "* * * The judgment awarded is not the judgment sought in the petition, plaintiff contending for the amount of increases plus a reasonable profit. The court, however, is authorized under our forms of pleading to award a judgment in accord with the facts stated and proven, notwithstanding the absence of a count in the pleadings for the particular recovery. *Wood et al.* v. *United States*, 49 C. Cls. 119; *Clark* v. *United States*, 95 U. S. 539."

It is significant also to notice that this contention of petitioner was made for the first time in the court below when it became the substance of defendant's motion for a new trial under Section 1088, Revised Statutes, filed May 18, 1936 (Rec. 30). The original petition was filed on February 24, 1930 (Rec. 1). Defendant filed no demurrer to this petition, but filed a general traverse (Rec. 3). Defendant had four years in which to raise

any objection to the original petition, but did not do so. After these many years, and at this late stage of the proceedings, petitioner now raises the question as to whether or not the general allegations of the original petition support the items of the claim specifically set forth in the amended petition.

Even if the original petition had imperfectly stated the cause of action, it is well settled that:

> "If a complaint not demurred to, sets out a cause of action, however imperfectly, it will withstand objection first made after judgment." *Vicksburg S. & P. Ry. Co.* v. *Anderson Tully Co.*, 261 Fed. 741, 744, 745, affirmed 256 U. S. 408.

Viewing the original petition in the light of the above-quoted decisions, it is respectfully submitted that the general allegations are entirely sufficient to sustain the specific items of the claim as set forth in the amended petition, and upon which judgment was rendered; and that it is now too late for petitioner to complain about the allegations of the original petition.

Development of Original Cause of Action.

The petitioner states that the amended petition was filed four years after the jurisdiction of the Court of Claims had lapsed (Pet. 16). This delay cannot be attributed to plaintiff below, for defendant's officers took four years in which to prepare and file the accounting requested in the original petition. This accounting was filed in the court below on September 9, 1934; it sets forth specifically all disbursements made under every

treaty and agreement, and act of Congress, dealing with plaintiff's funds, and furnished the basis upon which this case was tried (Rec. 16). It is evident to the court that no progress could be made in the trial of the case until this report was submitted by defendant.

After an examination of this accounting report, plaintiff below prepared and filed the amended petition, with leave of court (Rec. 3). Defendant made no objection to this petition when it was filed, and filed no demurrer to it (Rec. 8). As the lower court states: "The jurisdiction of the court to hear and determine the issues presented in the amended petition, filed on September 19, 1934, is not questioned by the defendant" (Rec. 16). Accordingly, on June 4, 1935, the case was submitted to the court on the amended petition (Rec. 8).

In the amended petition the original cause of action —the illegal disbursement of plaintiff's funds before and after the Curtis Act—remains the same. This petition merely particularizes the items of the general claim in the original petition. Thus in amending our petition we narrowed the broad allegations of the original petition to the specific items of illegal disbursement set forth in the amended petition. In other words, we have merely pleaded the facts concerning our original claim, as developed from the evidence submitted by defendant and prayed for in the original petition.

We believe that what has been done is covered by the rule as stated in *Buck* v. *United States,* 25 C. Cls. 120, 122, wherein the amendment occurred after the statutory period had run. The court said:

"The original petition embraced, by general allegation, the kind and quality of services contained in the amended petition, and the amended petition in addition contained a charge of $6.00 rendered in 1886, after the passage of the Act of August 4, 1886. Amendments are largely in the discretion of the court, and are always proper as against the statute of limitations, when no new cause of action is introduced and the amendment is confined to a mere development of the original cause of action (*Cape Ann Granite Company* v. *The United States*, 20 C. Cls. R. 1)."

The rules of pleading in the Court of Claims are liberal. In *The Fed. Mfg. & Printing Co.* v. *United States*, 44 C. Cls. 318, 321, 322, this court said:

"Section 954 of the Revised Statutes provides that any court of the United States may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall, in its discretion and by its rules, prescribe. This statute is in accord with the spirit of modern jurisprudence. The discretion of the courts ought to be exercised with great liberality in the allowance of amendments and will be in furtherance of justice so far as this court is concerned, except when the failure to observe the restraining rules of the common law will operate to unjustly prejudice the substantial right of the other party to the proceeding, and except in those cases where the amendment seems superfluous."

The lower court in the use of its discretion permitted the amended petition to be filed in this case, under its rules and without objection by defendant below, and it therefore took the place of the original petition.

It is well settled that the allowance of amendments is within the discretion of the lower court, and its action

thereon is not reviewable by this court. *Chirac* v. *Reinicker*, 11 Wheat. 280, 302; *Stevens's Admr.* v. *Nichols*, 157 U. S. 370, 371; *Howe* v. *Haterius*, 66 Fed. (2d) 835, 837. And in the case of *Union Pacific Ry. Co.* v. *United States*, 116 U. S. 402, this court refused certiorari to the Court of Claims to send up the original petition, when an amended petition was filed and the case heard upon it.

For the above reasons it is respectfully submitted that the lower court did not err in permitting the amended petition to be filed.

Petitioner's Second Question.

> "2. Whether Section 19 of the Curtis Act changed the purposes for which, and the persons to whom moneys due under trusts and statutes relating to the Seminoles should be paid."

The sole question before the court under this contention is whether or not Section 19 of the Curtis Act (Act of June 28, 1898, c. 517, 30 Stat. 495, 502) was repealed by the Seminole Agreement, ratified by Congress on July 1, 1898, c. 542, 30 Stat. 567. If Section 19 were not so repealed, then it remained in force and effect, and should have been followed by the Secretary of the Interior. Thus instead of "an important question of federal law which has not been hitherto presented to any court," as suggested by petitioner, the question is a simple one of statutory repeal, the rules of which have been long settled by this court.

The lower court found that $864,702.58 was disbursed by the Secretary of the Interior to the Seminole tribal treasurer during the time Section 19 was in force and

effect (Finding XII, Rec. 14), and granted recovery for the amount disbursed in violation of said provision, which prohibited such payments.

The petitioner contends that this section does not apply to the trust fund income, or to moneys not paid *per capita*. The income from the trust funds was practically all of the moneys the Seminoles had during this period, and if Section 19 did not apply to these moneys it could have no application at all. That said Section 19 applied to all Seminole moneys turned over to the tribal officers before the passage of the Curtis Act (which consisted entirely of trust fund income), is evident from the history of this legislation, which is reviewed by the lower court in its opinion (Rec. 23-25).

The Curtis Act, a comprehensive measure applying to the Five Civilized Tribes, of which the Seminole Nation is a member, had for its purpose the transformation of these tribal estates into individual allotments of land, and the equal division of the tribal funds to the members of the tribe.

Concerning conditions prevailing within the tribal governments before the Curtis Act, during which time the tribal income was disbursed by tribal officers, the court states (Rec. 24, 25):

> "Long before the passage of the Curtis Act, the utter inefficiency of the Indian tribal governments had been demonstrated and was universally recognized. It was also a matter of common knowledge throughout the Indian country that they were notoriously and incurably corrupt, and that every branch of the service was infested with favoritism,

graft, and crookedness of every kind. The Dawes Commission, in one of its early reports to Congress (1894), in speaking of these tribal governments and the prevailing conditions existing under them, said:

'Corruption of the grossest kind, openly and unblushingly practiced, has found its way into every branch of the service of the tribal governments. All branches of the governments are reeking with it, and so common has it become that no attempt at concealment is thought necessary. The governments have fallen into the hands of a few able and energetic Indian citizens, nearly all mixed blood and adopted whites, who have so administered their affairs and have enacted such laws that they are enabled to appropriate to their own exclusive use almost the entire property of the Territory of any kind that can be rendered profitable and available.

* * * * * * *

'The large payments of moneys to the Indians of these tribes within the last few years have been attended by many and apparently well-authenticated complaints of fraud, and those making such payments, with others associated with them in the business, have, by unfair means and improper use of the advantages thus afforded them, acquired large fortunes, and in many instances private persons entitled to payments have received but little benefit therefrom. And worse still is the fact that the places of payments were thronged with evil characters of every possible caste, by whom the people were swindled, defrauded, robbed, and grossly debauched and demoralized. And in case of further payments of money to them the Government should make such disbursements to the people directly, through one of its own officers.

* * * * * * *

'Justice has been utterly perverted in the hands of those who have thus laid hold of the forms of its administration in this Territory and who have in-

flicted irreparable wrongs and outrages upon a helpless people for their own gain.'

"The Curtis Act and succeeding acts of Congress had for their purpose the creation of correct membership rolls of the Five Civilized Tribes, the allotment of their tribal lands in severalty, the sale of the surplus remaining lands after allotments had been made, the equalization of allotments, the *per capita* distribution of the remaining tribal funds, the final winding up of tribal affairs and the ultimate dissolution of the tribal governments. As a part of this comprehensive general program it was provided by Section 19 of the Curtis Act:

'That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and *per capita* payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.'

"The undoubted purpose of this provision was to forever put an end to the intolerable conditions brought about by permitting the tribal governments to receive and disburse tribal moneys due them from the United States. It was to prevent unscrupulous tribal officers and corrupt designing persons associated with them from diverting to their own use and profit tribal funds, the common property of the tribe, and to insure that all members of the tribe would receive an equal share in the distribution of such funds. No more wholesome or humane provision was ever written into an Indian statute, and the Seminole Indians were entitled to its protection in the distribution of all tribal income due them from the United States. This protection,

however, was not afforded them, and a continuation of the 'irreparable wrongs and outrages upon a helpless people' was made possible by payment thereafter of large sums of their tribal funds to the tribal treasurer."

The petitioner further contends that Section 19 was repealed by the Seminole Agreement, and relies upon the decision of Assistant Comptroller Mitchell, dated August 23, 1898, which is printed as an appendix to petitioner's brief.

The opinion of the lower court clearly points out that no provision of any Seminole treaty provides that Seminole funds be paid to the tribal treasurer, but that this method of payment was purely statutory, and that Section 19 repealed these statutory provisions before the Seminole Agreement was ratified by Congress. The court states (Rec. 25, 26):

"The defendant says that Section 19 of the Curtis Act was not applicable to the Seminole Nation for the reason that the agreement negotiated November 16, 1897, between the United States and the Seminole Nation approved and ratified on July 1, 1898 (30 Stat. 567), 'superseded and repealed any and all provisions of the Curtis Act inconsistent therewith' and that the said agreement 'did not in anywise affect the provisions of the then existing treaties between the Seminole Nation and the United States, except in so far as such provisions might be inconsistent therewith.' This contention assumes necessarily, we think, that the right of the Seminole Nation to have moneys due it from the United States paid into the Seminole tribal treasury was secured to the tribe by then existing treaty provisions. This is not the case. No such provision is found in any

> treaty between the United States and the Seminole Nation. The right of the Secretary of the Interior to pay Seminole tribal funds into the tribal treasury, as well as the right of the tribal authorities to receive and disburse such funds was purely statutory, created by the Acts of April 15, 1874, and March 2, 1889, heretofore referred to. These acts were repealed by Section 19 of the Curtis Act and were nonexistent when the Seminole Agreement was ratified on July 1, 1898. There is nothing in the agreement inconsistent with the provisions of Section 19 of the Curtis Act, and the contention that the effect of the agreement was to repeal or supersede the provisions of this section is without merit."

During the period of this transformation, Mr. Justice Van Devanter occupied the position of Assistant Attorney-General for the Interior Department. He perforce came into contact with the members of the Dawes Commission, with the representatives of the various tribes, and with everyone interested in drafting and discussing the laws which would prevent the then existing abuses in the Indian Territory. He knew the history of the abuses and the purpose and intent of both executives and legislators to correct them.

The question now before us was presented to Assistant Attorney-General Van Devanter for an opinion. With all of this light before him he held that there was no inconsistency between Section 19 and the Seminole Agreement. The lower court, in its opinion, comments as follows (Rec. 26):

> "Immediately following the passage of the Curtis Act, Hon. Willis Van Devanter, then assistant attorney-general, now an associate justice of the Supreme Court, advised the Secretary of the Interior

in a written opinion that Section 19 of the Curtis Act applied to the Seminole Nation. The assistant attorney-general, after reviewing various sections of the Curtis Act, and the Act of July 1, 1898, said:

'I have therefore to advise that Section 19 of the Act of June 28, 1898, applies to the Seminole Nation of Indians. Moreover, it results from what has been hereinbefore said that whether that act applies or not, the manner of disbursement under the Seminole Act must be the same.'

While this opinion was not controlling as to the action of the Secretary of the Interior, and was shortly thereafter withdrawn by the assistant attorney-general for that reason, it was a correct decision of the legal question presented—a decision by an outstanding authority on the interpretation of Indian treaties and laws.

The Secretary of the Interior was therefore without legal authority to pay Seminole tribal funds into the Seminole tribal treasury. More than that he was plainly prohibited by the law from doing so. The payments being clearly illegal, the plaintiff is entitled to recover the amount shown by Finding XII, which is the sum of $864,702.58."

Had the Secretary of the Interior followed Mr. Van Devanter's opinion this question would not now be before us. However, the tribal officials and their counsel—the very officials at whom Section 19 was aimed—opposed this opinion, and had the question transferred to the comptroller. These officials had opposed the Curtis Act from the beginning. In its report of October 3, 1898, the Dawes Commission states:

"The knowledge of the preparation of this bill aroused great opposition of those in the Territory opposed to any change in the exclusive use of tribal

> property by the few controlling the government of the Territory. Accordingly large delegations were sent to Washington, at great expense to their national treasuries, for the purpose of preventing such legislation and procuring, if possible, the repeal of the law taking away so much of their political power, which was to take effect January 1, 1898."

The Van Devanter opinion was withdrawn, but never repudiated, and the Secretary, following the comptroller's decision, continued to pay the tribal income to the tribal officials in violation of Section 19. Thus the very purpose of this legislation was wholly disregarded.

The decision of Comptroller Tracewell, dated October 19, 1906, relied upon by petitioner (Pet. 24-25) to show consistency in the administrative construction of Section 19, was overruled by Attorney-General Bonaparte in 26 Ops. Attys. Gen. 340. Comptroller Tracewell, guided by the Bonaparte opinion, on May 29, 1908, reversed his decision of October 19, 1906, and advised the Secretary as follows:

> "On a reconsideration of my former decision, guided and influenced by the opinion of the attorney-general, *supra*, I now hold that expenditures from the tribal funds and annuities accruing to members of the Seminole tribe of Indians are to be disbursed under your authority and direction, such disbursements to be made under the requirements and limitations of law by which they are authorized."*

The petitioner is plainly mistaken in its contention that what it terms the "fourth trust" is involved in this question (Pet. 22). This is not supported by the rec-

*This decision was in the record below, exhibit, pages 1243-1245.

ord. The record shows that only moneys which petitioner paid to the tribal officers under the Act of April 15, 1874, and under the Act of March 2, 1889, are involved (Rec. 24). Although provided for in the Seminole Agreement, yet the "Seminole School Fund" was not created until March 6, 1906, and no part of the income of this fund was paid to the Seminole treasurer.

Thus it is evident that the decision of the lower court rests upon well-settled principles of statutory construction, and the rule applied was that there must be an inconsistency between the earlier and later acts in order that the later act repeal the former one. *Washington* v. *Miller*, 235 U. S. 422, 428. The court held that there was no inconsistency between Section 19 of the Curtis Act and the Seminole Agreement. Petitioner has not pointed out any inconsistency in these laws, and it is respectfully submitted that the lower court did not err in its conclusion on this question.

Petitioner's Third Question.

> "3. Whether a trustee who makes, at the request of his beneficiaries, payments to their agent, of which they do not deny receiving the benefit, is liable to pay these sums to the beneficiaries a second time."

This contention of petitioner assumes, without proof in the record or otherwise:

1. That the illegal payments were made at the request of respondent;

2. That the Seminole Nation received the benefit of them;

3. That after Congress has prohibited payments of tribal moneys to the tribal officials they are nevertheless agents of the tribe to receive them.

The cases cited by petitioner (Pet. 26, 27) have no application to the situation before us, for there is nothing in the record to show the consent of respondent to the illegal payments made by petitioner. The respondent was not free to act for itself, but was bound by the Acts of Congress governing the administration of its affairs.

It is well settled that a trustee makes payments at his peril, and that a mistaken interpretation of the law is no excuse for illegal payments. Bogert, Trusts and Trustees, page 2363. The principle is stated in *Burnell v. United States*, 44 C. Cls. 535, 548, as follows:

> "Hence, the general rule that a trustee is bound, at his peril, to see to the proper application of the trust fund applies to the government as well as to an individual trustee. (*Borcherlin's Case*, 35 C. Cls. R., 312, which was affirmed by the Supreme Court, 185 U. S. R. 223.) It must, therefore, be apparent that if the treasury department in the case at bar made payment out of a fund which it held in trust, through a mistake of law, to the party in law not entitled to receive the same, it transcended its authority and is responsible therefor to the rightful owner of the funds."

Congress is the trustee or guardian of the Seminole Nation, and has plenary power over the administration of its tribal funds. The Secretary of the Interior has only such powers over these funds as Congress has expressly delegated to him. When Congress, within its

plenary power, prohibits the Secretary from disbursing these funds in a certain manner, the Secretary is bound by the directions of Congress (*supra,* p. 8).

The petitioner suggests that the lower court erred in not applying the general law it cites in two instances: (a) payments in violation of Section 19 of the Curtis Act, and (b) payments of Treaty of 1866 moneys illegally made to the Seminole tribal treasurer. In both of these instances Congress expressly prohibited such payments.

Concerning the claim under Section 19 the lower court states (Rec. 26):

> "The Secretary of the Interior was, therefore, without legal authority to pay Seminole tribal funds into the Seminole tribal treasury. More than that he was plainly prohibited by the law from doing so."

Long before the passage of the Curtis Act the tribal officials ceased to be representative of the tribe, but instead were furthering their own selfish interests at the expense of the tribe (Rec. 24-25). When Congress, in Section 19, prohibited such payments to these officers they ceased to be agents of the tribe in this respect, and the illegal action of the Secretary in violating the plain mandate of Congress could not be held to defeat the purposes intended to be accomplished by the passage of this law.

The claim for $57,500.00 of the income from the $50,000.00 fund established by the Treaty of 1866 for school purposes, arose out of the misapplication by petitioner of the Act of April 15, 1874, to these funds.

The Act of 1874 applied only to funds arising out of Article VIII of the Treaty of 1856. The lower court, in its opinion (Rec. 22), states as follows:

> "* * * Neither the Act of 1874, nor any subsequent Act of Congress conferred authority on the Secretary of the Interior to disburse moneys due the plaintiff tribe under the Treaty of 1866 in any manner other than that provided in the treaty.
>
> "The treaty provided that the interest on the permanent school fund of $50,000.00 be 'paid annually and appropriated to the support of schools.' Congress never authorized disbursements of this fund to be otherwise made. * * *"

Therefore, this provision of the Treaty of 1866 was never performed by petitioner. Furthermore, Section 2097 of the Revised Statutes (quoted, *supra*, p. 11) prohibited disbursements in any other manner.

A complete answer to petitioner's contention is found in *The Creek Nation* v. *United States*, 78 C. Cls. 474, 491, from which decision no appeal was taken. The court says:

> "To hold that the Secretary of the Interior had the legal right to expend such funds, in the face of positive prohibition against their expenditure without specific appropriation would be equivalent to holding that the Secretary of the Interior, not Congress, had full administrative control and power over the property of the plaintiff tribe."

It is respectfully suggested that the question is not one of payment a second time, as contended by petitioner, but that respondent has not been properly paid the first time. It is respectfully submitted that the lower court did not err as claimed by petitioner.

MISCELLANEOUS CONTENTIONS OF PETITIONER.

The petitioner contends that the lower court erred in other respects, and we will answer these questions below.

Offsets Claimed by Petitioner.

The petitioner contends that the lower court erred "in failing to make findings of fact," and in holding that "in the absence of a formal counterclaim, the government was not entitled" to certain credits (Spec. of Error 5, 6, 7, 8 and 12; Pet. 13-15, 30).

That the lower court's decision is based upon more substantial reasons than those stated by petitioner, is evident from its opinion. The court denied this contention for the reasons that (1) the special jurisdictional act under which this suit was brought does not permit such offsets, and (2) that it was not established that plaintiff received the benefit of the payments. The lower court states as follows (Rec. 19):

> "The defendant says that even if the funds in question were not disbursed in strict accordance with the terms of the treaty, they were expended for the benefit of the plaintiff tribe, and that no damage resulted to the tribe from the 'diversion' of the funds, even if unauthorized. It is urged that if the United States be technically liable, the tribe having received the benefit of the expenditures, there arises in favor of the United States an equitable counterclaim for the same amount, which the court under Section 3 of the Jurisdic-

tional Act is authorized to pass upon. This contention was urged under like circumstances in *The Creek Nation* v. *United States, supra*, and was rejected by the court. Section 3 of the Jurisdictional Act authorizes the court to 'hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation.' 'Claims' as used in the section, of course, can mean only legal claims which the United States asserts by way of counterclaim. The United States has asserted no counterclaim, hence there is no claim against the plaintiff tribe which the court is authorized to 'hear, examine, consider, and adjudicate.' Even if the plaintiff received the benefit of the payments, and that fact is not established, they were payments made outside of the provisions of the treaty and as such were gratuities which the court under the jurisdictional act is without authority to offset against the plaintiff's claim."

The petitioner has gone outside of the record to set up certain of these items claimed. When this whole question was before the lower court these matters were fought out fairly. In order to properly answer petitioner's contentions as to these items, respondent would have to resort to the evidence in the court below. We do not feel justified in doing so in view of the decisions of this court that it will not go behind or review the findings of fact of the Court of Claims. *Sac and Fox Indians* v. *United States,* 220 U. S. 481, 488; *The Sisseton and Wahpeton Indians,* 208 U. S. 561, 566; *Jacob Reed's Sons* v. *United States,* 273 U. S. 200, 202; *Luckenback S. Co.* v. *United States,* 272 U. S. 533, 539, 540.

Seminole School Fund.

The petitioner contends that the lower court erred:

> "4. In holding that Congress had not authorized the government to make expenditures from the principal of the $500,000.00 trust fund which was set apart by the Seminole Agreement of 1897 (Opinion, Item 9), the lower court erroneously decided an important question of federal law which has not been hitherto presented to any court, but which should be settled by this court" (Pet. 27).

The question presented resolves itself into a simple one: whether or not Congress modified by subsequent legislation the terms of the Seminole Agreement so as to permit payments from the principal of the permanent school fund during the fiscal years 1920 to 1930, the period covered by the claim.

The Seminole Agreement of 1897, ratified by Act of July 1, 1898, c. 542, 30 Stat. 567, 568, provided as follows:

> "Five hundred thousand dollars ($500,000.00) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five per cent interest, or invested so as to produce such amount of interest, which shall be, after extinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of the Seminole people: and there shall be selected and excepted from allotment three hundred and twenty acres of land for each of said academies and eighty acres each for eight district schools in the Seminole country."

Commenting upon this provision the lower court states as follows:

> "The fund under the provisions of the agreement was to be a 'permanent school fund' for the education of children of members of the Seminole tribe, the Secretary of the Interior being authorized to apply only the interest thereon for that purpose. He could not under the terms of the agreement expend any part of the principal fund for education or for any other purpose" (Op., Rec. 27).

Petitioner contends (Pet. 27, 28) that the Act of May 25, 1918, c. 86, 40 Stat. 561, 580, modified the terms of the Seminole Agreement, and authorized such payments. We admit that this act authorized a *per capita* payment out of the Seminole school fund, but this authorization applied to the fiscal year 1919 *only*. The Act of May 25, 1918, appropriated moneys for the fiscal year *1919* only, and this authorization ended on June 30, 1919. Respondent's claim did not begin until the fiscal year 1920, and continued until the fiscal year 1930. Therefore, subsequent legislation must be relied upon to determine whether or not Congress authorized such payments from the principal of the Seminole school fund. Petitioner has pointed out no such authority.

The Act of June 30, 1919, c. 4, 41 Stat. 3, 23, appropriating for the fiscal year 1920 (the year in which the claim begins), provides in part as follows:

> "That during the fiscal year ending June 30, 1920, no moneys shall be expended from tribal funds

belonging to the Five Civilized Tribes, without specific appropriation by Congress."

Similar provisions were contained in each of the annual appropriation acts beginning with the Act of August 24, 1912, c. 388, 37 Stat. 518, 531, until the Act of May 24, 1922, c. 199, 42 Stat. 552, 575, by the terms of which this provision became a permanent provision of law (Rec. 27, 28). Therefore, specific appropriations by Congress were required under the law before the principal of the Seminole school fund could be lawfully reduced.

Petitioner further relies upon the general authorizations in the annual appropriation acts giving the Secretary the right to continue tribal schools of the Five Civilized Tribes from tribal funds. These provisions in so far as they affect Seminole funds generally authorized payments for Seminole schools from general funds of the tribe, and payment of the *interest* on the "Seminole School Fund" for the continuance of schools; however, there is no specific authority in such provisions for depletions of the "Seminole School Fund" *principal*. The intent of these provisions would seem to be directly to the contrary, for to reduce the principal of the permanent school fund would cut off the income therefrom, and would accordingly reduce the means by which these schools might be continued.

The "Seminole School Fund" was a special fund set aside for a special purpose—that of providing sufficient income permanently for the education of the Seminoles. Unlike other general Seminole funds, this

school fund was not available for general disbursements. Therefore, the general authorizations in the yearly appropriation acts could have no possible application to the "Seminole School Fund," and did not authorize depletions of the principal of this fund. Congress would have to specifically act to do so.

We believe that the lower court completely answers petitioner's contention as follows:

> "That Congress had the power to change the terms of the agreement and authorize these payments is well established, but we find no act of Congress that either in express terms or by necessary implication authorized any of them."

Petitioner's Obligations under Treaty of 1856.

The petitioner claims that the lower court erred in its holding that the government was liable for a deficiency in payments under Article VIII of the Treaty of 1856 for the reasons that (1) the government had spent them for the relief of loyal refugee Indians instead of the purposes originally contemplated, and (2) that the Treaty of 1866 released any liabilities that might have existed for those years (Spec. of Error 10, 11; Pet. 14).

The record does not support the statement of petitioner that this money was spent for refugee Indians, and no finding to that effect was made by the court below (Findings III, IV; Rec. 10, 11). The court sufficiently answers these contentions as follows (Rec. 18):

> "* * * The general language, 'The stipulations of this treaty are to be a full settlement of all claims of said Seminole Nation for damages and losses of every kind growing out of the late Rebel-

lion,' has no application and cannot be held to include this item of the Seminole claim for the reason that substantially the whole amount claimed was due and unpaid before the outbreak of the war and consequently is not one for 'damages and losses growing out of the War of the Rebellion.' The simple facts are that the United States covenanted with the Seminole tribe in Article VIII of the Treaty of 1856, as a part of the consideration for the treaty, to provide annually for them for a period of ten years fixed sums for the support of schools, for agricultural assistance, and for the support of smiths and smith shops among them. In the absence of subsequent specific enactment by Congress to the contrary, the United States was obligated to disburse the funds stipulated in the manner and for the purposes designated in the treaty. The United States failed to discharge this treaty obligation in full, having disbursed only a part of the amount for the purposes named in the treaty. The plaintiff tribe is entitled to recover the undisbursed balance of $61,563.42."

Agency Buildings.

The petitioner contends that the lower court erred in holding that Article VI of the Treaty of 1866 should be construed to require the government to spend the entire $10,000.00 for agency buildings, and that the court erred in fixing the damages on this basis (Pet. 15, Pars. 13, 14).

The obligation of the government under Article VI of the Treaty of 1866 was part of the consideration for a cession by the Seminole Nation to the United States of 2,169,080 acres of land (Article III, Treaty of March

21, 1866, 14 Stat. 755). This money was due and owing to the Seminoles; they gave their land for it. The question now before us is whether the government conformed to its treaty promise to them. For this reason the cases cited by petitioner on the matter of damages (Pet. 31) have no application to the question now before us.

The lower court permitted recovery in the amount of $9,068.24, the difference between the $10,000.00 obligation, and $931.76 expended for agency buildings and repairs (Rec. 23, 24), after the court found that $9,030.15 of the $10,000.00 appropriated by Congress had been misspent. The court found the facts as follows:

> "It does not appear for what purpose the $9,030.15 expended out of this appropriation was used, but it was not used for the purpose of erecting agency buildings" (Finding XI; Rec. 14).

The facts disclosed that Congress appropriated $10,000.00 in the Act of July 28, 1866, c. 296, 14 Stat. 310, 319, to fulfill this treaty obligation, but this sum was not used and was returned to surplus. Congress again appropriated $10,000.00 to replace the amount returned to surplus, in the Act of May 18, 1872, c. 172, 17 Stat. 122, 132. Congress having twice fixed the amount of this obligation at $10,000.00 (Finding XI; Rec. 13, 14), the amount of this obligation became definite in this amount. It is respectfully submitted that the small payment of $931.76, paid for agency buildings and repairs out of another general appropriation, and not out of the $10,000.00 appropriation, would not be a substantial com-

pliance with this treaty obligation. As this money was misspent after it was so appropriated by Congress, recovery for this item could also be sustained for a violation of Section 2097, Rev. Stat., quoted *supra,* page 11.

CONCLUSION.

The petitioner has not questioned the two basic principles of law upon which the lower court decided this whole case. For the reasons heretofore mentioned it is respectfully submitted that the petition should be denied.

Respectfully submitted,

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No. 172

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Supreme Court of the United States

OCTOBER TERM, 1936

THE UNITED STATES

v.

THE SEMINOLE NATION

BRIEF OF RESPONDENT.

PAUL M. NIEBELL,
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Attorneys for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 172

THE UNITED STATES

v.

THE SEMINOLE NATION

BRIEF OF RESPONDENT.

May It Please the Court:

This is a review granted by this court to the United States of a decision of the Court of Claims holding that the respondent was entitled to recover the amount of $1,317,087.27. The opinion of the Court of Claims was rendered December 2, 1935, and is not as yet reported. The petition for writ of certiorari was granted on October 12, 1936.

STATEMENT.

This suit was instituted under the special jurisdictional act of May 20, 1924, c. 162, 43 Stat. 133, 134, authorizing the Court of Claims to adjudicate:

> "any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian Affairs."

This act was modified by joint resolution of May 19, 1926, 44 Stat. 458, permitting plaintiff to bring separate suits on one or more causes of action; and by the act of Congress approved February 19, 1929, c. 268, 45 Stat. 1229, the time for filing such suits was extended to June 30, 1930 (R. 10).

On February 24, 1930, the Seminole Nation filed the original petition requesting an accounting by the United States of disbursements under "various treaties and agreements," and under various acts of Congress governing disbursements from the Seminole trust funds, and after reciting specifically Section 19 of the Curtis Act, and Section 2097 Revised Statutes, the petition states that "thus in violation of law" certain expenditures were made by defendant, and that the facts were within the sole knowledge of defendant. The petition then prayed that after receipt of the accounting report requested, "plaintiff be permitted to amend this petition, and that plaintiff have judgment against the defendant in such sum or sums as appear to this court to be expended without authority of law." (R. 1, 2)

The accounting requested in the original petition was filed by defendant in the court below on September 9, 1934. Having had access to this report before the date of its filing, plaintiff below, on September 4, 1934, asked leave of court to file an amended petition to set up facts disclosed in the accounting report. This leave was granted, and on September 19, 1934, the amended petition was filed. (R. 3)

The amended petition sets forth specifically the *items* of illegal disbursement from Seminole funds made in violation of the terms of treaties and agreements and other illegal disbursements of Seminole funds made in violation of various acts of Congress governing same (R. 3-8), as shown by

the Report of the General Accounting Office. The defendant below filed no objection to the amended petition either at the time it was filed, or at the time of the trial (R. 16), and this amended petition, together with the report of the General Accounting Office, furnished the basis upon which this case was tried in the lower court (R. 16).

The Cause of Action.

The cause of action presented in both the *original* and *amended* petitions was the illegal disbursement by the Secretary of the Interior of respondent's funds arising under its treaties and agreements, and the illegal disbursement of respondent's funds made in violation of various acts of Congress governing their disbursement.

The case is concisely stated in the opinion of the court below as follows (Rec. 16):

> "* * * The claim is one of accounting, except as to one item, and in the main is similar to the claim presented in The Creek Nation v. United States, 78 C. Cls. 474.
>
> * * * * * * *
>
> "The plaintiff's claim in the aggregate amounts to $1,746,013.23, and consists of items falling generally within two classes:
>
> 1. Items as to which it is alleged that the United States failed to make payments in the amounts and in the manner provided by its treaties and agreements with the Seminole Nation.
>
> 2. Items as to which it is alleged payments were made by the Secretary of the Interior out of Seminole trust funds without authority of law."

In accordance with the above classification the items of the claim now in dispute may be outlined as follows:

Class 1.

Items 1, 3 and 4 (Findings III, IV, VI and VII (R. 10-12, 16-20), involve the obligations of the United States due to

the Seminole Nation under Articles VIII and IX of the Seminole treaty of August 7, 1856, 11 Stat. 699, 702.

Items 5 and 7 (Findings IX and XI) (R. 12-14, 20-22), involve the obligations of the United States due to the Seminole Nation under Articles III and VI of the Seminole treaty of March 21, 1866, 14 Stat. 755.

Class 2.

Item 8 (Finding XII) (R. 14, 23-26), involves the illegal disbursement of Seminole moneys under Section 19 of the Act of Congress, approved June 28, 1898, c. 517, 30 Stat. 495, 502 (The Curtis Act).

Item 9 (Finding XIII) (R. 14, 26-27), involves the illegal disbursement of the principal of the "Seminole School Fund" established under the terms of the original Seminole Agreement, ratified by Act of Congress of July 1, 1898, c. 542, 30 Stat. 567, 568.

Items 11, 12, and 13 (Findings XIV, XV, and XVI) of recovery are not questioned by petitioner.

All of the material facts, and all of the relevant portions of the treaties and acts involved, appear in the special findings of fact of the court below (Rec. 9-29).

The Main Question.

The main question in this case is: whether the executive officers of the United States, in disbursing Seminole moneys, must follow the express mandates of the legislative branch as contained in the provisions of treaties, agreements and Acts of Congress, or whether the executive officers may disregard these legislative mandates, and disburse these moneys in their discretion. Thus the independence of the coordinate branches of our Government is brought into issue—the petitioner squarely presents the issue of the superiority of the executive over the legislative branch—and to hold with petitioner the court would have to assume that the executive was superior; that the executive, instead of

taking as a basis for its acts, the clear mandates of the legislative when rendered within its sphere, could exalt itself over the legislative, and could ignore the clear mandates of the legislative rendered within its sphere.

In the case of the *Creek Nation* v. *United States*, 78 C. Cls. 474, a case similar in principle to the one at bar, the court held that the executive officers must follow the express mandates of the legislative branch, stating as follows (*supra*, p. 491):

> "* * * To hold that the Secretary of the Interior had the legal right to expend such funds, in the face of positive prohibition against their expenditure without specific appropriation would be equivalent to holding that the Secretary of the Interior, not Congress, had full administrative control and power over the property of the plaintiff tribe. * * *"

The principles of law applied by lower court.

The law governing items of the claim under Class 1 above stated is set out by the court as follows (Rec. 23):

> "In determining the plaintiff's right to recover as to these items, we have applied the rule that an Indian tribe is entitled to have the full amount due it under the terms of a treaty with the United States disbursed in the manner and for the precise purposes named in the treaty, unless Congress by subsequent legislation provides that payment be otherwise made, and that the United States is liable to the tribe for the balance of any moneys not so disbursed and expended."

The law governing items of the claim under Class 2 above stated is set out by the court as follows (Rec. 23):

> "We now come to the consideration of the items of the claim where it is alleged disbursements of Seminole trust funds were made by the Secretary of the Interior without authority of law. In the consideration of these items the rule stated in The Creek Nation v. United States, supra, will be applied:

> 'That Congress has plenary power over the administration of Indian affairs is well settled. Cherokee Nation v. Georgia, 5 Pet. 1; Cherokee Nation v. Hitchcock, 187 U. S. 294; Lone Wolf v. Hitchcock, 187 U. S. 553. The Secretary of the Interior has only such authority over the funds of Indian tribes as is confided in him by Congress. He cannot legally disburse and pay out Indian funds for purposes other than those authorized by law. This rule is the test by which the legal right of the Secretary of the Interior to make the disbursements involved must be determined.' "

The above principles of law cover this whole case and are applied to all items of the claim.

Jurisdictional Question Raised by Respondent.

In our brief opposing the petition for writ of certiorari, we took the position that the United States had made application to this court after the expiration of the 90 days allowed by Section 8 (a) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940 (U. S. C., Title 28, Sec. 350), and cited *Rust Land & Lumber Co.* v. *Jackson*, 250 U. S. 71, 76; *United States* v. *Lippmann, Spier & Hahn*, 260 U. S. 739; *Hooper* v. *United States*, 274 U. S. 743; that defendant's second motion for new trial was filed under Section 1088, Revised Statutes, Judicial Code, Sec. 175 (U. S. C., Title 28, Sec. 282), and that the mere filing of such a motion would not enlarge the time for filing an application for certiorari but that the motion and the application are independent matters and may exist together, *United States* v. *Ayres*, 9 Wall. 608; *Ex parte Russell*, 13 Wall. 664; *Ex parte United States*, 16 Wall. 699; and that a decision of the Court of Claims on such a motion was final. *Young* v. *United States*, 95 U. S. 641.

The petitioner filed a reply memorandum denying that its motion was filed under Section 1088, claiming that the motion was a broad one. The respondent was unable to file a reply to this memorandum before the court acted upon the

petition. In its present brief, the United States restates the substance of its reply memorandum, which we will briefly comment upon.

The only leave asked for and granted to petitioner by the Court of Claims was that it file the second motion for a new trial "pursuant to R. S., Sec. 1088, Judicial Code, Sec. 175, U. S. C., Title 28, Sec. 282." (Rec. 30.) *No leave was granted to petitioner to file any other kind of motion.*

The petitioner states that "Moreover, the attached motion, which spoke for itself, made no reference to R. S. Sec. 1088 and was a general motion." (Br. p. 2.) To show that this motion was actually filed under Section 1088, and that it matters not how the motion was worded, we need only to quote from petitioner's brief in support of this motion, as follows:

> "* * * Since this error goes to the jurisdiction of this court, it can be raised at any stage of the proceedings. Matson Navigation Co. v. United States, 284 U. S. 352, 359; cf. United States v. Martinez, 195 U. S. 469, and is an error which does such wrong and injustice to the United States as to fall within the provisions of R. S. Sec. 1088, Judicial Code Sec. 175, U. S. C., Title 28, Sec. 282. McCollum, Adm'r v. United States and the Rogue River Indians, 33 Ct. Cls. 469, 474; cf. Sanderson v. United States, 210 U. S. 168. As this court stated in the McCollum case at page 474—
>
> 'A motion for a new trial, *however worded*, which shows a want of jurisdiction in the court to render the judgment must, if filed after the term at which the judgment was rendered and within two years from the date thereof, be treated as a motion under section 1088, as any judgment rendered without jurisdiction necessarily imposes a wrong upon the judgment defendants.'" (Italics ours.)

We were aware of the decision in the case of the *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498, cited by petitioner, but it is suggested that this case is not applicable to a motion for new trial under said Section 1088—an extraordinary mo-

tion, and from a decision thereon, no review is provided. In *Young* v. *United States*, 95 U. S. 641, 643, this court stated:

> "* * * Over its (Court of Claims) decision within that jurisdiction we have no control, for the statute has not provided an appeal. The new trial is to be granted if the evidence submitted, whether cumulative or otherwise, is sufficient to satisfy that court 'that fraud, wrong, or injustice had been done to the United States.' * * *. We are all of the opinion that the decision of the Court of Claims upon a motion by the United States within the prescribed jurisdiction, is conclusive and not subject to review."

In *Ex parte Russell*, 13 Wall. 664, 669, in construing Section 1088 this court has said:

> "Neither the existence nor the determination of the appeal interferes with the right, on the part of the Government, to apply for a new trial; and, of course, the mandate from this court cannot affect it."

It is respectfully suggested that if the court retains jurisdiction it would be holding, in effect, that there can be a review of the decision of the Court of Claims under Section 1088, for it is from the date of the overruling of the Government's motion under this section that petitioner bases its right to have this case reviewed.

ARGUMENT.

QUESTIONS RAISED BY PETITIONER.

We will answer the questions raised by petitioner in the order in which they appear.

Petitioner's Contention I.

The petitioner contends that (Pet. Br. 23):

> "The jurisdiction of the Court of Claims was limited to claims of the Seminole Nation arising from payments

made, after July 1, 1898, by the Government, from trust funds, created under Seminole treaties or agreements, to persons other than the Seminole tribal treasurer.

This question arises out of the pleadings filed by plaintiff in the court below, and was raised by petitioner for the first time when it became the substance of defendant's motion for new trial under Section 1088, Rev. Stat. (see *supra*, pages 6-8).

The original petition was filed on February 24, 1930, which was within the limitation fixed by the special jurisdictional act as amended (Rec. 10). After the accounting report requested by the original petition was examined, the amended petition, with leave of court first obtained, was filed on September 19, 1934 (Rec. 3). The case was tried upon this amended petition, and as the lower court states (Rec. 16) "The jurisdiction of the court to hear and determine the issues presented in the amended petition, filed on September 19, 1934, is not questioned by the defendant." In its first motion for new trial the question was not raised by defendant. After the many years the original petition was before the lower court, and after all the expense entailed in the preparation of the case and the submission of the accounting report prayed for therein had been incurred, and after this petition had been supplanted by the amended petition, defendant filed in the court below a motion under Section 1088 Revised Statutes, which was in effect a belated demurrer to the original petition. It is respectfully submitted that under the above circumstances the petitioner's present contention is most unreasonable, and that it is now too late to raise any question of pleading which has been waived for the past six years.

The petitioner's contention overlooks the fact that the jurisdictional act permitted the Seminole Nation, for the first time in its history, to adjudicate "*any and all legal and equitable claims*" arising under or growing out of its treaties and agreements, and acts of Congress relating to

Indian Affairs; that the right of the ward to demand an accounting of its guardian is an equitable right support of which needs no citation; and that in a petition requesting a general accounting, wherein it is alleged that all of the facts are within the sole knowledge of defendant, the guardian, allegations need not be specific, and may be general.

Let us review the whole matter for the court.

The cause of action, preserved in the original petition, was the *illegal disbursement* of plaintiff's treaty and trust funds arising under the *various* treaties and agreements between the Seminole Nation and the United States, before the Curtis Act; and the *illegal disbursement* of said funds in violation of treaties, agreements, and other various acts of Congress governing these disbursements, after the Curtis Act. The petition was, of necessity, couched in general terms as the specific facts concerning the claim were within the sole knowledge of the defendant. The petition prayed that as soon as the general accounting report was filed with the court, plaintiff be permitted to amend to conform to the proof, "and that plaintiff have judgment against the defendant in such sum or sums as appear to this court to be expended without authority of law."

There was reason for our adopting this course. This case is similar in principle to the Creek accounting case, 78 C. Cls. 474, in which we were attorneys for the Creek Nation. In an endeavor to get the Creek case to trial speedily, we attempted to work out the specific claims presented in the petition by ourselves making an audit of the books of defendant, and we employed accountants for this purpose. The defendant's officers had promised to "check" this work, thereby saving time that would be required for another general audit by the Government. However, instead of "checking" the work of our accountants, defendant's officers made a new and complete audit of all moneys disbursed by the United States under all of the Creek treaties (beginning in 1790), agreements, and acts of Congress dealing with their affairs, and refused to proceed with the case

until this report was completed. After many years of delay, this report was filed in the case. To this evidence of defendant the plaintiff was forced to conform, and the petition was so amended in the Creek case as was done in this case.

With our experience in the Creek case before us, we saw the utter futility of our former course, and the needless expense to which the Seminole Nation might be put, and in our petition in the Seminole case we prayed for a general accounting with the right to amend to conform to the facts disclosed in the accounting report.

The petitioner contends (Pet. Br. 26) that the jurisdictional act was not intended to authorize the Seminoles to request a general accounting.*

Section 1 of the Act of May 20, 1924, c. 162, 43 Stat. 133, provides:

> "That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitations, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian Affairs, which said Seminole Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States."

That Congress intended to authorize a general accounting is evidenced by the following statement of Congressman W. W. Hastings, in the debate on this bill in the House of Representatives (House Bill 5799, Congressional Record, Vol. 65, 68th Cong., 1 Sess., page 3503, date March 3, 1924):

> "Mr. Hastings. Mr. Speaker, the Seminole Tribe of Indians is one of the Five Civilized Tribes of Okla-

*In all of these Indian cases it has been the policy of the Government to make a general accounting of all moneys disbursed for each tribe, and there is nothing unusual in the request for accounting made herein by respondent.

> homa. This tribe is about to be emancipated; that is, it is about to come out from under the supervision of the Federal Government. Their lands have been allotted and their moneys divided among the members of the tribe. Since about the year 1898 the Government of the United States has had complete supervision over and disbursement of the funds of the tribe, and inasmuch as this tribe is about to be emancipated, the members want an opportunity to make an examination into the handling of their affairs, and if there are any objections they want an opportunity to go into court, exactly like a minor on becoming of age. *The minor has the right to inspect a guardian's report, and this tribe wants to have the opportunity to except to any item or transaction of the Government.* We should not object to permitting these Indians going into our own courts to present their claims." (Italics ours.)

The Report of the House Indian Committee on this bill, dated January 31, 1924 (Cong. Ser. 8226, H. Rep. 134, 68 Cong., 1 Sess.), states as follows:

> "The bill has for its purpose a *final and complete settlement of all difference and accounts between the Government and the Seminole Indians by judicial determination* with the right of appeal to the Supreme Court of the United States. The affairs of the Seminole Tribe are about wound up, all of their lands have been allotted and their tribal funds disbursed." (Italics ours.)

This report also sets forth the report of Hubert Work, Secretary of the Interior, dated January 30, 1924, to the Chairman of the Committee on Indian Affairs of the House, favorably recommending the passage of this legislation. This letter states in part as follows:

> "*No specific claim of the Seminole Nation or Tribe against the Government has been brought to my attention.* However, as the tribal affairs of the Seminole Nation or Tribe are nearing their close, and as the affairs covered a period of years and involved the disbursement of considerable sums of money, *it may be there should be an accounting and that where there are differences as to the accounting or as to the interpreta-*

tion of the statutes, the Seminole Tribe should be permitted to go to the Court of Claims to have the matters in dispute adjudicated. If Congress should conclude that there is sufficient reason to permit the Seminole Nation or Tribe to have these matters referred to the Court of Claims, no objection is seen to that course being pursued." (Italics ours.)

The above statements show that Congress intended that the Seminole Nation should have an accounting so that there might be a "final and complete settlement of all difference and accounts between the Government and the Seminole Indians by judicial determination," and the language of this jurisdictional act carries out this intent by expressly waiving the statute of limitations, and providing that the Seminole Nation may adjudicate "any and all legal and equitable claims." The equitable right of the ward to demand an accounting of its guardian is too well established for argument, and it is submitted that what was done in this case was clearly within the intent of Congress in passing the jurisdictional act of 1924.

Petitioner suggests that such a course would be a departure from the usual practice in the Court of Claims (Pet. Br. 26). On the contrary, in this course we were supported by the Rules of that court. Rule 12 then in force (now Rule 14, Revised Rules), provided that:

"12. When the plaintiff cannot state his case with the requisite particularity without an examination of papers in one of the executive departments and has been unable to obtain a sufficient examination of such papers on application he may file a petition stating his claims, as far as is in his power, and specifying, as definitely as he can, the papers he requires, and thereafter may file a motion for a call upon the proper department for such information or papers as may be deemed necessary, and when the same are furnished the petition may be amended and take the place of the original petition."

Petitioner, in an attempt to narrow the construction of our original petition, contends that the lower court erred (1) in granting recovery for illegal disbursements of respondent's treaty funds before July 1, 1898, because the original petition sought recovery only for illegal disbursements after that date, and (2) that recovery for illegal disbursements of the income of certain trust funds only was sought therein.

1.

To uphold the first point raised by petitioner Paragraphs II and VII (Rec. 1, 2) of the original petition would have to be disregarded altogether. The general allegations in these paragraphs, coupled with those in Paragraph VIII, show clearly that plaintiff sought recovery for illegal disbursements under "*various* treaties and agreements between said plaintiff and defendant", before July 1, 1898, which is the first period covered by the claim. Paragraph II alleges "That at all times mentioned herein, and for many years prior thereto," plaintiff was the owner of large trust funds, held in trust by the defendant for its use and benefit, and that there existed *various* treaties and agreements between plaintiff and defendant whereby said trust funds were to be managed and invested by defendant, and the interest thereon paid over to the National Treasurer of plaintiff.

The use of the word "treaties" shows that our claim antedates July 1, 1898, for no more treaties could be made with an Indian tribe after the passage of the Act of March 3, 1871, c. 120, 16 Stat. 544, 566 (Rev. Stat., Sec. 2079). The use of this broad term clearly shows that our claim antedates the year 1898, and reaches back of 1871, and is so all-inclusive that it would embody any treaty between the plaintiff and the United States prior to the passage of the Act of 1871. After the Act of March 3, 1871, agreements only could be made with an Indian tribe. We used the broad term "agreements," signifying that the claim

includes any agreements made after the Act of March 3, 1871.

The allegation in Paragraph II that the interest on the trust funds was to be paid to the National Treasurer of plaintiff also clearly shows that the claim antedates July 1, 1898, for this method of paying certain of this income has its inception in the Act of April 15, 1874, c. 97, 18 Stat. 29.

All of this the petitioner admits in its brief wherein it states that Paragraph II "states the origin and long duration of the plaintiff's right." (Pet. Br. 31)

Paragraph VII also clearly shows that this claim antedates July 1, 1898. This allegation is as follows:

> "That at all times mentioned herein a certain act of Congress now known as Section 2097, Revised Statutes of the United States, was in full force and effect. That said section is as follows:
>
> 'No funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner not authorized by such treaty, or by express provisions of law; nor shall money appropriated to execute a treaty be transferred or applied to any other purpose, unless expressly authorized by law'" (Rec. 2).

Section 2097, Revised Statutes, was in full force and effect since its passage on July 26, 1866, c. 266, 14 Stat. 255, 280, and applies up to the time of the Curtis Act, when a new order of affairs was established. This allegation shows clearly that our claim for illegal disbursements antedates July 1, 1898.

Let us impress upon the court that all moneys claimed before July 1, 1898, for which the lower court permitted recovery, had been appropriated by Congress to fulfill the treaties with plaintiff (Rec. 11-13), but were not disbursed by defendant in the manner so provided in said treaties. Therefore, these illegal disbursements were also made in violation of said Section 2097, and the allegations in Para-

graph VII would cover most of the items of illegal disbursement before July 1, 1898, upon which recovery was had in the amended petition.*

It is submitted that the contention of petitioner that the claim in the original petition does not antedate July 1, 1898, is without merit.

2.

The second point raised by petitioner is equally without merit. That petitioner is guardian of respondent, the Seminole Nation, is well settled, and any moneys due under treaties and agreements which were to have been disbursed by petitioner for the benefit of respondent would be trust funds in the general sense, and the general allegations of the original petition clearly imply that trust funds were not used in the narrow sense as suggested by petitioner, but in the general sense. Then, too, from the broad language of Section 2097, above quoted, the clear inference is that the claim includes all treaty funds, whether trust funds in a narrow sense, or general treaty funds.

Second period of respondent's claim.

The second period of our claim begins with the Curtis Act, approved on June 28, 1898, c. 517, 30 Stat. 495, for under this act the United States assumed full administrative control of the affairs of the Five Civilized Tribes. In the light of the knowledge then available to us, and guided by our experience in the Creek case, *supra,* we drafted Paragraphs III to VI, inclusive, of the original petition. These paragraphs allege violations of the terms of treaties and agreements, and other acts of Congress, beginning with July 1, 1898 (the beginning of the fiscal year after the Curtis Act became effective), as the result of which defendant illegally disbursed plaintiff's funds. Violations of Sec-

*Section 2097 is considered by the lower court in its opinion with reference to Item 3 (Rec. 20).

tion 19 of the Curtis Act, and the illegal disbursement of the principal of the permanent "Seminole School Fund" come within this period.

Paragraph VI of the original petition provides:

> "That from July 1st, 1898, until the present time, defendant, in violation of its duty as trustee of the funds of plaintiff, in violation of the rights of plaintiff under its various treaties and agreements with defendant, and without authority of Congress, has spent large sums of the trust funds of plaintiff" (Rec. 2).

Petitioner contends that paragraphs III to VI of our original petition are not broad enough to cover the item of the claim for illegal disbursements under Section 19 of the Curtis Act (Amended Petition, Rec. 6). Paragraph IV of the original petition specifically sets up Section 19, and Paragraph V alleges that after the Curtis Act Congress passed various acts giving authority for the expenditure of plaintiff's funds, but that no one of these acts gave authority for the expenditure of the funds claimed as being illegally disbursed. Then Paragraph VI alleges illegal disbursements in violation of treaties and agreements, carrying over into this period, and further alleges other illegal disbursements made "*without authority of Congress*". As the illegal disbursements claimed in violation of Section 19 were made after July 1, 1898, *without authority of Congress*, as alleged in Paragraph VI of our original petition, it is obvious that this item of our claim is amply covered by the general allegations of our original petition.

Then, too, a mere reference to petitioner's contentions under the item of claim under Section 19, shows that petitioner relies upon the Seminole Agreement, ratified by Congress on July 1, 1898, to defeat this claim (Pet. Br. 50). The respondent contends that the Seminole Agreement does not authorize these payments to the tribal officers. Thus the Seminole Agreement is squarely brought into issue; making this claim similar in principle to the claim for il-

legal disbursements of the principal of the Seminole School Fund, which petitioner admits comes within the allegations of Paragraphs IV, V, and VI of the original petition. (Pet. Br. 38, footnote 13.) In other words, if petitioner admits that one of these items of the claim comes within the allegations of the original petition, surely it should admit that the other item is covered by the original petition, as both of these items bring into issue the terms of same law—the Seminole Agreement.

The petitioner further contends as to our claim under Section 19 that the allegations in Paragraphs II and III of our original petition show an inconsistency with the item of claim set forth in Paragraph VIII of the amended petition (Rec. 6). The petitioner works out this inconsistency by comparing the allegation in Paragraph II of the original petition, alluding to payments of interest to plaintiff's national treasurer, with the allegation in Paragraph III that after the Curtis Act defendant refused to make further payments to plaintiff's national treasurer. These allegations were incidental to the claim and were merely intended to be, and actually were, descriptive of the two separate periods or "eras" of the claim—before and after the Curtis Act. No claim was made in Paragraph II of our original petition, or in the amended petition, for moneys lawfully paid to the tribal treasurer before the Curtis Act, nor was judgment given for any such payment. No claim was made for moneys which the petitioner refused to turn over to plaintiff's treasurer, nor was judgment given on any such claim after the Curtis Act.*

Therefore, these allegations being merely incidental to the cause of action—illegal disbursements of plaintiff's funds—and being merely descriptive of the two periods of

*The truth of the allegation that defendant refused to turn moneys over to plaintiff's treasurer after the Curtis Act, under the Van Devanter opinion, is well known to the court. However, defendant later reversed its position, and thus violated the law as set forth in Section 19 of the Curtis Act. As we have heretofore pointed out, this violation is covered by the allegations in Paragraphs III to VI of our original petition.

the claim, would furnish no basis for petitioner's present contention that the claim for illegal disbursements under Section 19, as set forth in the amended petition, is foreign to the general claim for said illegal disbursements alleged in Paragraphs III to VI of the original petition.

The petitioner further contends that as the $1,500,000 trust fund—involved in the claim under Section 19 of the Curtis Act—was established by the Act of March 2, 1889, c. 412, 25 Stat. 980, 1004, a statute, there is no allegation in the original petition covering illegal payments of the interest on this particular fund made to the tribal treasurer after July 1, 1898. It is difficult to follow this contention, for we do not claim as illegal disbursements any interest payments under the Act of 1889 made before the terms of this Act were modified by Section 19 of the Curtis Act. The respondent claims that after July 1, 1898, this interest was illegally disbursed in violation of Section 19 of the Curtis Act. Let us repeat, no claim was made by respondent for any of these interest payments *before* the passage of the Curtis Act, because these payments were then lawfully made to the Seminole tribal treasurer in accordance with the provisions of the Act of 1889.

However, Section 19 of the Curtis Act repealed that part of the Act of 1889 permitting payments to the Seminole tribal treasurer, and therefore changed the manner of disbursement of the interest payments arising from this fund. Section 19 provided that thereafter *none* of these interest payments shall be made to the tribal treasurer for disbursement. As payments of this interest continued to be made to the tribal treasurer after July 1, 1898, in violation of Section 19, and were not thereafter authorized by Act of Congress, these illegal disbursements were covered by the general allegations in Paragraphs III to VI, inclusive, of the original petition.

The original petition further alleges in Paragraph VIII:

> "That the defendant has thus spent, in violation of law, a large amount of the trust funds of plaintiff.

That the exact amount of such expenditure will be shown by the books and records of defendant, and that such knowledge is in the possession of defendant, and not of plaintiff.

"Wherefore, plaintiff prays that defendant be required to file in this cause a statement showing its expenditures of plaintiff's funds during said period, the purposes for and dates when such expenditures were made, and the authority of law, if any, which authorized defendant to make such expenditures; that, if necessary thereafter, plaintiff be permitted to amend this petition, and that plaintiff have judgment against the defendant in such sum or sums as appear to this court to be expended without authority of law, with interest at six per centum per annum from the date of the expenditure of the several items constituting said sum" (Rec. 2, 3).

After having set up that plaintiff was owner of trust funds under its *various* treaties and agreements which *were to* have been managed by defendant and the interest thereon paid to plaintiff's treasurer, and after having quoted Section 2097 Revised Statutes, the Curtis Act (Section 19 specifically), and after alleging that after the Curtis Act Congress passed various acts giving authority for the expenditure of plaintiff's funds, but that no one of these acts gave authority for the expenditure of the amounts complained of, plaintiff, in addition to charging specifically the defendant with illegal disbursements after July 1, 1898 (Par. VI), then charges in Paragraph VIII "That the defendant has thus spent, *in violation of law*, a large amount of the trust funds of plaintiff." It is respectfully submitted that this general charge is sufficient to inform defendant of the nature of all violations—either before or after the Curtis Act—for which recovery was sought in the original petition.

Petitioner contends that the language of the prayer, above quoted, is so narrow that it would not include in the request for a general accounting any items before July 1, 1898, and that this is evident from the language "that

defendant be required to file in this cause a statement showing its expenditures of plaintiff's funds during said period." This implication from the broad language used is not justified. Clearly we intended "said period" to refer to the whole period of the claim, and the judicial interpretation of the word "said" supports our intention.

In Words and Phrases, Vol. 7, page 6286, this word is interpreted as follows:

> "The word 'said' is often used as a word of reference to what has been already spoken of or specified; and if there is a question as to which of the antecedent things or propositions specified is referred to, it is generally held to refer to the last of such antecedent propositions or things. Hinrichsen v. Hinrichsen, 50 N. E. 135, 136, 172 Ill. 462."

And again in Words and Phrases, 3rd. Series, p. 902, it is stated:

> "'Said' means aforesaid or before mentioned and refers to what has been already spoken of or specified, and refers to the last one of antecedent propositions or things in case of any question." Le Flore v. Handlin, 240 S. W. 712, 715; 153 Ark. 421.

A reference to the original petition shows that Paragraph VII is the last antecedent proposition, and in that paragraph the period stated was "At all times mentioned herein," which refers back to any and all periods mentioned in the preceding paragraphs, especially paragraphs VI and II.

Thus we see that the word "said" in connection with "period" would not jump over Paragraph VII of the original petition, as defendant contends, but would refer specifically to the period mentioned in this paragraph, which is "At all times mentioned herein." This period would relate back to any of the previous periods mentioned in the petition.

It is apparent to the court that the general accounting requested was the essence of the petition. As was said in *Green* v. *Brooks*, 22 P. 849, 851:

> "The very object of an accounting may be, and frequently is, to ascertain how much has been realized and expended, so as to determine whether the cestui que trust is entitled to payment."

The rules of pleading are liberal in cases wherein a fiduciary relationship exists, and it is well settled that in a petition for a general accounting:

> "When existence of the fiduciary relationship and receipt of property thereunder by defendant are alleged, and nothing is stated barring the right of relief, the complaint is sufficient." 65 C. J. 902.

And again:

> "Where matters essential to the determination of claims by complainant in a bill for an accounting are charged to rest in the knowledge of defendant, or must of necessity be within his knowledge, and are consequently the subject of a part of the discovery sought by the bill, precise allegations thereof are not required." 1 C. J. 635; State v. Ill. Cent. R. Co., 246 Ill. 188, 92 N. E. 814, 835.

The petitioner makes the further contention that we are required to plead the particular recovery sought, and that the court is without authority to grant any other recovery. This contention has no support in law.

In the case of *Electric Boat Co.* v. *United States*, 66 C. Cls. 333, 377, in commenting upon the rules of pleading in the Court of Claims, Mr. Chief Justice Booth states:

> "* * * The judgment awarded is not the judgment sought in the petition, plaintiff contending for the amount of increases plus a reasonable profit. The court, however, is authorized under our forms of pleading to award a judgment in accord with the facts stated and proven, notwithstanding the absence of a count in the pleadings for the particular recovery.

Wood et al. v. United States, 49 C. Cls. 119; Clark v. United States, 95 U. S. 539."

And in *Clark* v. *United States,* 95 U. S. 539, 543, this court stated as follows:

> "If objected that the petition contains no count upon an implied contract for quantum meruit, it may be answered, that the forms of pleading in the Court of Claims are not of so strict a character as to preclude the claimant from recovering what is justly due to him upon the facts stated in his petition, although due in a different aspect from that in which his demand is conceived."

From the above holdings it is obvious that if a petition states the substance of the right of recovery, the court, under the rules of pleading, may grant the recovery it considers proper to do justice to the plaintiff.

Even if the original petition had imperfectly stated the cause of action, it is well settled that:

> "If a complaint not demurred to, sets out a cause of action, however imperfectly, it will withstand objection first made after judgment." Vicksburg S. & P. Ry. Co. v. Anderson-Tully Co., 261 Fed. 741, 744, 745, affirmed 256 U. S. 408.

Viewing the original petition in the light of the foregoing discussion and the above quoted decisions, it is respectfully submitted that the general allegations are entirely sufficient to sustain the specific items of the claim as set forth in the amended petition and upon which the court based its judgment; and that it is now too late for petitioner to complain of these general allegations of the original petition.

Development of original cause of action.

The petitioner states that the amended petition was filed four years after the jurisdiction of the Court of Claims had lapsed (Pet. Br. 32). This delay in amending our pe-

tition cannot be attributed to plaintiff below, for defendant's officers took four years in which to prepare and file the accounting requested in the original petition. It is evident to the court that no progress could be made in the trial of the case until this report was submitted by defendant.

In accordance with the request in the original petition, the General Accounting Office compiled its report, showing disbursements under *every* treaty and agreement between the Seminole Nation and the United States, and under *all* acts of Congress governing these disbursements. Surely defendant's accounting officers were not deceived as to the meaning and intent of our original petition. This accounting report was filed by defendant in the court below on September 9, 1934, and our amended petition was based upon this report.

After an examination of this accounting report, plaintiff below prepared and filed the amended petition, with leave of court first obtained (Rec. 3). Defendant made no objection to this petition when it was filed, and made no objection to it at the trial, and the case was heard upon it (Rec. 8).

In the amended petition the *original cause of action*—the illegal disbursement of plaintiff's funds before and after the Curtis Act—*remains the same.* This petition merely *particularizes the items* of the general claim in the original petition. Thus in amending our petition we "*narrowed*" the broad allegations of the original petition to the specific items of illegal disbursement set forth in the amended petition. In other words, we have merely pleaded the facts concerning our original claim, as developed from the evidence submitted by defendant in the accounting report, which was prayed for in the original petition. The petitioner cannot properly say that we have gone outside of this accounting report to set up items of our claim in the amended petition, and it must be conceded that this was not done. Nor can it be said that petitioner was sur-

prised, or deprived of any defense, or put to any disadvantage whatever, because of the amended petition, for it was filed before the trial of the case.

We believe that what has been done is covered by the rule as stated in *Buck* v. *United States,* 25 C. Cls. 120, 122, wherein the amendment occurred after the statutory period had run. The court said:

> "The original petition embraced, by general allegation, the kind and quality of services contained in the amended petition, and the amended petition in addition contained a charge of $6.00 rendered in 1886, after the passage of the Act of August 4, 1886. Amendments are largely in the discretion of the court, and are always proper as against the statute of limitations, when no new cause of action is introduced and the amendment is confined to a mere development of the original cause of action (Cape Ann Granite Company v. The United States, 20 C. Cls. R. 1)."

See also the cases of *Hardin* v. *Boyd,* 113 U. S. 756, 761-765; *Richmond* v. *Irons,* 121 U. S. 27, 43-47; *Texas and Pacific Ry. Co.* v. *Cox,* 145 U. S. 593, 603.

The rules of pleading in the Court of Claims are liberal. In *The Fed. Mfg. & Printing Co.* v. *United States,* 41 C. Cls. 318, 321, 322, this court said:

> "Section 954 of the Revised Statutes provides that any court of the United States may at any time permit either of the parties to amend any defect in process or pleadings upon such conditions as it shall, in its discretion and by its rules, prescribe. This statute is in accord with the spirit of modern jurisprudence. The discretion of the courts ought to be exercised with great liberality in the allowance of amendments and will be in furtherance of justice so far as this court is concerned, except when the failure to observe the restraining rules of the common law will operate to unjustly prejudice the substantial right of the other party to the proceeding, and except in those cases where the amendment seems superflous."

The lower court in the use of its discretion permitted the amended petition to be filed in this case, in accordance with its rules and without objection by defendant below, and it therefore took the place of the original petition.

It is also well settled that the allowance of amendments is within the discretion of the lower court, and that its action thereon is not reviewable by this court. *Chirac* v. *Reinicker*, 11 Wheat. 280, 302; *Stevens's Admr.* v. *Nichols*, 157 U. S. 370, 371; *Howe* v. *Haterius*, 66 Fed. (2) 835, 837. And in the case of the *Union Pacific Ry. Co.* v. *United States*, 116 U. S. 402, this court refused certiorari, to the Court of Claims to send up the original petition, when an amended petition was filed and the case heard upon it.

For the reasons above set forth it is respectfully submitted that the lower court did not err in permitting the amended petition to be filed, and that the original petition filed herein would cover by general allegation all of the items upon which judgment was had in the lower court.

Petitioner's Contention II.

The petitioner contends (Pet. Br. 39) that:

> The Government is not liable to the Seminoles for the $864,702.58 which it paid out of Seminole Trust Funds to the tribal treasurer from the fiscal year 1899 through the first half of the fiscal year 1907.

The lower court held that the petitioner was liable for the failure of the Secretary of the Interior to follow the plain mandate of Congress, as contained in Section 19 of the Curtis Act, which resulted in the loss to the Seminole Nation of its yearly income. The rule of law applied by the lower court is stated as follows (Rec. 23):

> "That Congress has plenary power over the administration of Indian affairs is well settled. Cherokee Nation v. Georgia, 5 Pet. 1; Cherokee Nation v. Hitchcock, 187 U. S. 294; Lone Wolf v. Hitchcock, 187 U. S. 553. The Secretary of the Interior has only such au-

> thority over the funds of Indian tribes as is confided in him by Congress. He cannot legally disburse and pay out Indian funds for purposes other than those authorized by law. This rule is the test by which the legal right of the Secretary of the Interior to make the disbursements involved must be determined."

Section 19 of the Curtis Act, approved June 28, 1898, 30 Stat. 495, 502, provides as follows:

> "That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

The petitioner divides its contention into three parts, which we will follow in our reply.

Petitioner's Contention A.

The petitioner contends (Pet. Br. 40) that:

> Section 19 of the Curtis Act does not apply to the type of trusts involved in Item 8.

We cannot agree with this contention because (1) it attempts to narrow the broad language of the *first part* of Section 19 and to limit its operation to per capita payments only; (2) it overlooks the holding to the contrary in *The Creek Nation* v. *United States*, 78 C. Cls. 474 (a final decision); (3) it overlooks the intent of Congress and the object behind the passage of Section 19; and (4) it overlooks the fact that if Section 19 did not apply to this trust fund income it could have no application at all, as this was the only source of income of the Seminole Nation during the period of this claim.

It is evident to the court that Section 19 provides separately for per capita payments in the *second part* of this provision, this authorization being separated from the first part of this section by a semi-colon. The broad language of the *first part* of this section provides:

> "That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him".

In the Creek case, *supra*, the court passed upon the precise question now before us. In this case petitioner took a position *directly opposite to the one for which it now contends*, and therein strongly and successfully urged that Section 19 of the Curtis Act was in full force and effect for the period from 1898 to 1912, inclusive, and that under it the Secretary of the Interior had *broad powers*, including implied authority to disburse Creek funds for purposes not specifically authorized by Congress. The court, in this case, held (78 C. Cls. 474, 487-488, 489-490):

> "The authority to disburse the tribal funds and all moneys coming to the tribe under the provisions of the three acts was lodged solely in the Secretary of the Interior".
>
> "Section 19 of the Curtis Act changed only the manner in which the Creek tribal funds were to be disbursed. Neither that section nor any other provision of the act defines or limits in any way the purposes for which the tribal funds might be expended. These funds were no longer paid into the Creek National Treasury by the United States for the purpose of disbursement by the tribal authorities, but were retained in the Treasury of the United States to the credit of the tribe, and were disbursed by the Secretary of the Interior. * * * * Consequently, we think that when Congress, by the provisions of Section 19 of the Curtis Act, took away from the Creek tribal authorities the

> control which they had formerly exercised over the disbursement of their tribal funds and charged the Secretary of the Interior with the duty of disbursing the funds, without defining or limiting the purposes for which they might be expended, it by clear and necessary implication invested him with authority to disburse and expend the funds in such manner and for such purposes as would, in his judgment, satisfy the needs of the Creek Nation and promote the welfare and happiness of its citizens, subject to such limitations as Congress might subsequently impose".*

With the light of the decision of the court in the Creek case upon Section 19 before us, which breaks down the contention of petitioner that Section 19 is to be narrowly construed, let us examine the particular trusts, the incomes of which are involved in this question.

$50,000 TRUST FOR SUPPORT OF SCHOOLS.

The petitioner suggests that Section 19 would not affect what it terms the second trust, established by Article III of the Treaty of March 21, 1866, because its purpose was for education and not for per capita payments (Pet. Br. 45). Article III provides in part that:

> "the *United States agree to pay* in the following manner, to-wit: * * * seventy thousand dollars to remain in the United States Treasury, upon which the United States shall pay an annual interest of five per cent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which *shall be paid annually and appropriated to the support of schools;* * * *" (Italics ours).**

We agree with petitioner when it states that "Congress never intended to alter or abandon its educational pro-

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*The court in the Creek case held that under Section 19 the Secretary had implied power to disburse moneys from tribal funds for the expenses of the tribal government. 78 C. Cls. 474, 494.

**The other $20,000 fund for the support of the Seminole Government is not involved in the claim.

gram'' (Pet. Br. 45). The petitioner's officers, however, did abandon this educational program *without authority of Congress.* As early as the period from 1867 to 1874, inclusive, petitioner failed to perform in full this treaty provision; and from 1875 to 1898, instead of paying this $2,500 yearly for education, this amount was paid to the Seminole treasurer, under a misapplication of the Act of April 15, 1874, c. 97, 18 Stat. 29, to this fund. We claim for this violation specifically in Item 5 (Rec. 20-22).

Then even after Section 19 was passed prohibiting such payments, the petitioner continued to violate this treaty provision, and also violated the plain prohibition in Section 19, by continuing to pay this school money over to the tribal treasurer.

It is significant also that both Article III of the Treaty of 1866, and Section 19 require this money to be paid *by the United States for the specific purposes,* and therefore the manner of disbursement in both provisions is the same.

THE $500,000 TRUST.

The trust fund of $500,000 was established under Article 8 of the Treaty of August 7, 1856, 11 Stat. 699. Article 8 provides in part as follows (Rec. 4):

> "* * * the *United States* do therefore agree and stipulate as follows, viz: * * * Also to invest for them the sum of two hundred and fifty thousand dollars, at five per cent per annum, the interest to be regularly paid over to them per capita as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the two sums so invested shall constitute a fund belonging to the united tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually *paid over to them per capita* as an annuity; but no portion of the principal thus invested, or the interest thereon annually due and payable, shall ever be taken

> to pay claims or demands against said Indians, except such as may hereafter arise under the intercourse laws." (Italics ours.)

The Act of April 15, 1874, c. 97, 18 Stat. 29, changed the manner of disbursing this money and permitted the $25,000 yearly income to be paid into the treasury of the Seminole Nation (Rec. 19). No claim is made by respondent for payments lawfully made in accordance with the Act of April 15, 1874. This manner of payment continued until the passage of the Curtis Act, and was repealed by Section 19 of that Act. With the repeal of the Act of 1874, and in accordance with Section 19 and the Seminole agreement, the manner of payment provided in the Treaty of 1856 was revived; *i. e.*, that these payments be made by the *United States* instead of by the tribal officers.

Our claim arises when the Secretary of the Interior failed to comply with the law as laid down in Section 19, and continued to pay over these moneys to the tribal treasurer. It is significant to notice that this interest was originally authorized to be *paid by the United States* for per capita payments, and that the manner of disbursement provided in Article 8 of the Treaty of 1856, and Section 19, is the same.

THE $1,500,000 TRUST.

The $1,500,000 trust was established by Section 12 of the Act of March 2, 1889, c. 412, 25 Stat. 980, 1004, which provided in part as follows:

> "One million five hundred thousand dollars to remain in the Treasury of the United States to the credit of said nation of Indians and to bear interest at the rate of five per centum per annum from July first, eighteen hundred and eighty-nine, said interest to be paid semi-anually to the treasurer of said nation."*

*The $412,942.50 paid to the tribal officers under this Act (referred to by petitioner in its brief, page 48), was embezzled by the very officers (Brown, et al.) and the very same counsel (Samuel J. Crawford) who later fought to retain control of the Seminole funds. The Seminole Nation

Payments of the income on this trust fund to the tribal treasurer continued until this manner of payment was repealed by Section 19 of the Curtis Act. No claim is made by respondent for this income lawfully paid under the Act of 1889. Our claim arises out of the failure of the Secretary to follow Section 19 during the years 1899 to 1907, during which time the Secretary was required to disburse this income himself, in order to insure its proper receipt by the Seminole Nation.

We have reviewed these trust funds to show the court that the income from these funds was practically all of the moneys the Seminole Nation had before the Curtis Act was passed, and it was in the *handling of this income* by the tribal officers that complaints of gross fraud were made by the Dawes Commission, which resulted in the passage of Section 19 of the Curtis Act. If Section 19 did not apply to these moneys it could have no practical application at all, for there would be no moneys upon which it could operate, and Congress would be convicted of passing a useless provision of law.

The intent of Section 19 of the Curtis Act.

Let us pass on to the question of the intent of Congress in the passage of Section 19 of the Curtis Act. It is well settled that the spirit as well as the letter of a statute must be considered, and the intent, not the letter of the statute constitutes the law. *Durrousseau* v. *United States,* 6 Cranch 307, 313; *National Bank* v. *Matthews,* 98 U. S. 621, 626; *Pickett* v. *United States,* 216 U. S. 456, 461.

The petitioner suggests that the legislative history of Section 19 supports the contention that this section is to be so narrowly construed as to permit per capita payments

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has filed a separate suit to recover this item. The record of this transaction, and the investigation of it made by the Department of Justice, were filed in the record below in the case at bar, and tend to confirm the reports of the Dawes Commission setting forth the true conditions prevailing within the governments of the Five Civilized Tribes, which Congress sought to correct by the passage of Section 19 of the Curtis Act.

only (Pet. Br. 43). In answer to this suggestion we will refer the court to the decision of Assistant Comptroller Mitchell, dated August 30, 1898, 5 Comp. Dec. 93. In passing upon the identical points now raised by petitioner the Comptroller said (supra, page 96):

> "There does not seem to be room for serious doubt as to the meaning of the opening lines of section 19, of the act of June 28, 1898, supra. They import a plain, unqualified, and comprehensive prohibition of all payments by the United States to the tribal governments, or any officer thereof, on any account whatever for disbursement. Had the intent been simply to provide for payments to members of the tribes, either per capita or otherwise, by a disbursing officer of the United States, the prohibition found in the first three lines was unnecessary. * * *"*

To determine the intent of Congress it is important to review the conditions prevailing within the tribal governments of the Five Civilized Tribes out of which grew the necessity for the change brought about in the Curtis Act, under which the United States reassumed control of the administration of the affairs of these tribes.

Let us impress upon the court that the Curtis Act and the various agreements made with the various tribes were but a part of a single legislative scheme, worked out by the same officials, practically at the same time and for the same purpose—that of preventing the robbery of the private citizens of the tribe by the unscrupulous tribal officers, and the transferring of the administration of the tribal property and funds from these tribal officials to the United States Government.

The lower court, in its opinion (Rec. 24, 25) reviews the conditions prevailing within the tribal governments before

*This part of the Comptroller's decision was followed by the Secretary and by the Court of Claims in the Creek case, *supra*, when it held that Section 19 applied to Creek funds. The further holding in this decision, that Section 19 did not apply to the Creek funds after the Creek agreement became effective, was not followed by the Secretary or the Court in the Creek decision.

the Curtis Act, during which time the tribal income was disbursed by tribal officials, as follows:

> "Long before the passage of the Curtis Act, the utter inefficiency of the Indian tribal governments had been demonstrated and was universally recognized. It was also a matter of common knowledge throughout the Indian country that they were notoriously and incurably corrupt, and that every branch of the service was infested with favoritism, graft, and crookedness of every kind. The Dawes Commission, in one of its early reports to Congress (1894), in speaking of these tribal governments and the prevailing conditions existing under them, said:
>
> 'Corruption of the grossest kind, openly and unblushingly practiced, has found its way into every branch of the service of the tribal governments. All branches of the governments are reeking with it, and so common has it become that no attempt at concealment is thought necessary. The governments have fallen into the hands of a few able and energetic Indian citizens, nearly all mixed blood and adopted whites, who have so administered their affairs and have enacted such laws that they are enabled to appropriate to their own exclusive use almost the entire property of the Territory of any kind that can be rendered profitable and available.
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> * * * * * * * * * *
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> 'The large payments of moneys to the Indians of these tribes within the last few years have been attended by many and apparently well-authenticated complaints of fraud, and those making such payments, with others associated with them in the business, have, by unfair means and improper use of the advantages thus afforded them, acquired large fortunes, and in many instances private persons entitled to payments have received but little benefit therefrom. And worse still is the fact that the places of payments were thronged with evil characters of every possible caste, by whom the people were swindled, defrauded, robbed, and grossly debauched and demoralized. And in case of further payments

of money to them the Government should make such disbursements to the people directly, through one of its own officers.

* * * * * * * * *

'Justice has been utterly perverted in the hands of those who have thus laid hold of the forms of its administration in this Territory and who have inflicted irreparable wrongs and outrages upon a helpless people for their own gain.'

"The Curtis Act and succeeding acts of Congress had for their purpose the creation of correct membership rolls of the Five Civilized Tribes, the allotment of their tribal lands in severalty, the sale of the surplus remaining lands after allotments had been made, the equalization of allotments, the per capita distribution of the remaining tribal funds, the final winding up of tribal affairs and the ultimate dissolution of the tribal governments. As a part of this comprehensive general program it was provided by section 19 of the Curtis Act:

'That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.'

"The undoubted purpose of this provision was to forever put an end to the intolerable conditions brought about by permitting the tribal governments to receive and disburse tribal moneys due them from the United States. It was to prevent unscrupulous tribal officers and corrupt designing persons associated with them from diverting to their own use and profit tribal funds, the common property of the tribe, and to insure that all members of the tribe would receive an equal share in the distribution of such funds. No

> more wholesome or humane provision was ever written into an Indian statute, and the Seminole Indians were entitled to its protection in the distribution of all tribal income due them from the United States. This protection, however, was not afforded them, and a continuation of the 'irreparable wrongs and outrages upon a helpless people' was made possible by payment thereafter of large sums of their tribal funds to the tribal treasurer."

As the lower court rightly holds, Section 19 was intended to correct the abuses prevailing in the manner of disbursing Seminole funds, and it was enacted to take away from the tribal officers the right they had exercised and abused under the Acts of April 15, 1874 and March 2, 1889, and to transfer that right to the Secretary in order to insure to the members of the Seminole Nation an equal share in the distribution of their tribal funds. That Congress can change the manner of disbursement under the Acts of 1874 and 1889, without the consent of the Seminoles, is too well established for further comment.

Section 19 was not repealed by the Seminole Agreement.

The Secretary of the Interior did not heed the plain mandate of Congress as set forth in Section 19, and continued to pay Seminole funds over to the tribal officers. If the Seminole Agreement, ratified by Congress on July 1, 1898, c. 542, 30 Stat. 567, repealed Section 19 then the Secretary was right in his course of action; but if there was no repeal of Section 19 by the Seminole Agreement, the Secretary's course was wrong.

The petitioner contends that Section 19 was repealed by the Seminole Agreement, and relies upon the decision of Assistant Comptroller Mitchell, dated August 23, 1898, which is printed as an appendix to petitioner's brief, page 23.

The opinion of the lower court clearly points out the error in this Comptroller's decision in that no provision of

any Seminole treaty provides that Seminole funds be paid to the tribal treasurer, but that this method of payment was purely statutory, and that Section 19 repealed these statutory provisions before the Seminole Agreement was ratified by Congress; and that the Seminole Agreement did not repeal Section 19 for the manner of disbursement of Seminole moneys under each provision is the same. The court states (Rec. 25, 26):

> "The defendant says that section 19 of the Curtis Act was not applicable to the Seminole Nation for the reason that the Agreement negotiated November 16, 1897, between the United States and the Seminole Nation approved and ratified on July 1, 1898 (30 Stat. 567), 'superseded and repealed any and all provisions of the Curtis Act inconsistent therewith' and that the said agreement 'did not in anywise affect the provisions of the then existing treaties between the Seminole Nation and the United States, except insofar as such provisions might be inconsistent therewith.' This contention assumes necessarily, we think, that the right of the Seminole Nation to have moneys due it from the United States paid into the Seminole tribal treasury was secured to the tribe by then existing treaty provisions. This is not the case. No such provision is found in any treaty between the United States and the Seminole Nation. The right of the Secretary of the Interior to pay Seminole tribal funds into the tribal treasury, as well as the right of the tribal authorities to receive and disburse such funds was purely statutory, created by the acts of April 15, 1874, and March 2, 1889, heretofore referred to. These acts were repealed by section 19 of the Curtis Act and were nonexistent when the Seminole agreement was ratified on July 1, 1898. There is nothing in the agreement inconsistent with the provisions of section 19 of the Curtis Act, and the contention that the effect of the agreement was to repeal or supersede the provisions of this section is without merit."

The unscrupulous tribal officers at whom Section 19 was aimed had been present in Washington to oppose it. The

Dawes Commission, in its report of October 3, 1898, comments as follows:

> "The knowledge of the preparation of this bill (Curtis) aroused great opposition of those in the Territory opposed to any change in the exclusive use of tribal property by the few controlling the government of the Territory. Accordingly large delegations were sent to Washington, at great expense to their national treasuries, for the purpose of preventing such legislation and procuring, if possible, the repeal of the law taking away so much of their political power, which was to take effect January 1, 1898. It was deemed necessary, therefore, to require the presence of the commission in Washington during the pendency of such legislation to give information to the committees having it in charge as to the real condition of the Territory and the needs of and character of the legislation proposed."

With their cause lost before Congress, these tribal officers took the only course then open to them—to attempt to avoid the operation of Section 19 through administrative action. They asked the Secretary of the Interior to pass upon the question now before us.

During the period of this whole transformation, Mr. Justice Van Devanter occupied the position of Assistant Attorney General for the Interior Department. He perforce came into contact with the members of the Dawes Commission, with the representatives of the various tribes, and with everyone interested in drafting and discussing the laws which would prevent the then existing abuses in the Indian Territory. He knew the history of the abuses and the purpose and intent of both executives and legislators to correct them.

When this question now before us was first raised it was presented to Assistant Attorney General Van Devanter for an opinion. With all of this light before him he held that there was no inconsistency between Section 19 and the Seminole Agreement. This opinion is as follows:

DEPARTMENT OF THE INTERIOR

Office of the Assistant Attorney-General
Washington

July 12, 1898.

The Secretary
Of the Interior,

Sir:

By your communication of July 9, 1898, I am asked for an opinion whether section 19 of an act of Congress approved June 28, 1898 (Public-No. 162), entitled "An act for the protection of the people of the Indian Territory, and for other purposes," applies to the Seminole Nation of Indians.

Said section is as follows:

That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.

It is submitted that until the passage of this act it had been the practice of this Department, under the laws and regulations then in force, to deposit "such funds" in bulk with the Assistant Treasurer of the United States, at St. Louis, to the credit of the treasurers of "these tribes," to be disbursed by them in their own way, under the laws of their respective nations.

By the expression "such funds" and "these tribes," used in your communication, I take it is meant moneys due any of the five civilized tribes from the United States government. The practice of this Department, therefore, has been to deposit any moneys, subject to disbursement on account of these tribes, with the Assistant Treasurer, at St. Louis, to the credit of the treasurers thereof, to be disbursed by them without the further supervision of the government.

Section one of the act, *supra*, provides that the word "officer," where the same appears in the criminal laws

theretofore extended over and put in force in the Indian Territory, shall include all officers "of the several tribes or nations of Indians in said Territory."

Section 2 authorizes and requires the Judge of a United States Court of any district in said Territory to make "any tribe" of Indians a party to any suit pending in his court where it appears that the property of such tribe in in any way affected by the issues being heard.

Section 3 confers jurisdiction on the United States district courts in said Territory to try cases against persons who claim to hold lands and tenements as members of a tribe, and whose membership is denied by the tribe, and provides that "if it be found upon trial that the same are held unlawfully against the tribe by those claiming to be members thereof, and the membership and right are disallowed by the commission to the *Five Tribes*, or the United States court * * * then said court shall cause the parties charged with unlawfully holding said possessions to be removed from the same and cause the lands and tenements to be restored to the person or persons or nation or tribe of Indians entitled to the possession of the same."

Section 4 provides, "That all persons who have heretofore made improvements on lands belonging to any one of the said tribes of Indians" may under certain conditions sell and dispose of the same.

Section 11 provides for the allotment of lands when the roll of citizenship of "any one of said nations or tribes" is fully completed.

Section 15 provides, "That there shall be a commission in each town for each one of the Chickasaw, Choctaw, Creek and Cherokee tribes," who shall cause to be surveyed and laid out townsites.

Section 16 makes it unlawful for any person to claim, demand or receive any royalty or rents on any lands or property belonging to "any one of said tribes or nations in said Territory."

Section 17 provides that it shall be unlawful for "any citizen of any one of said tribes" to hold possession of more than his approximate share of the allotted lands.

It is apparent from these excerpts from the act that section 19 prohibits the payment by the United States of

moneys on any account whatever to officers or tribal governments of *any* of the five civilized tribes.

The Seminole Indians as such are nowhere mentioned in the act, but these Indians constitute one of the five civilized tribes, and are within the inhibition of said section, unless, as to them, it has been repealed by subsequent legislation.

An act approved July 1, 1898 (Public—No. 172), ratified the agreement of December 16, 1897, between the Dawes Commission and the Seminole Nation of Indians. One of the stipulations of that agreement was, that:

All moneys belonging to the Seminoles remaining after equalizing the value of allotments as herein provided, and reserving said sum of five hundred thousand dollars for school fund, shall be paid per capita to the members of said tribe in three equal instalments, the first to be made as soon as convenient, after allotment and extinguishment of the tribal government. Such payments shall be made by a person appointed by the Secretary of the Interior, who shall prescribe the amount of and approve the bond to be given by such person; and strict account shall be given to the Secretary of the Interior for such disbursements."

The act *supra*, which ratifies and confirms this agreement, repeals "all laws and parts of laws inconsistent therewith."

There is nothing in the language quoted inconsistent with the provisions of section 19 of the act of June 28, 1898, *supra*. Indeed, these provisions in the two acts are substantially the same. The provision in the Seminole act that "all moneys belonging to the Seminole Indians * * * shall be paid *per capita* to the members of said tribe," the first payment to be made after the "extinguishment of tribal government" "by a person appointed by the Secretary of the Interior," is the substantial equivalent of the language used in the general act that payments shall not be made "to any of the tribal governments or any officer thereof," but shall be made per capita direct to each individual, "under direction of the Secretary of the Interior by an officer appointed by him."

I have therefore to advise that section 19 of the act of June 28, 1898, applies to the Seminole Nation of Indians. Moreover, it results from what has been hereinbefore said

that whether that act applies or not, the manner of disbursement under the Seminole act must be the same.

Very respectfully,

WILLIS VAN DEVANTER.
Assistant Attorney General.

Department of the Interior,
July 12, 1898,

Approved:
THOS. RYAN,
Acting Secretary.

Thunderstruck at the Van Devanter opinion these tribal officers employed Crawford to represent them. Crawford, knowing that the Comptroller had under consideration a similar question concerning the Creek funds, got the matter transferred to the Comptroller. The Comptroller then rendered practically the same opinion in both Creek and Seminole matters.* Although the Secretary refused to follow the Comptroller's decision in the Creek matter, yet he followed the Comptroller's decision in the Seminole, and began turning over the funds to Brown, *et al.*, the tribal officers.

The lower court, in commenting upon the Van Devanter opinion, states as follows (Rec. 26):

> "While this opinion was not controlling as to the action of the Secretary of the Interior, and was shortly thereafter withdrawn by the Assistant Attorney General for that reason, it was a correct decision of the legal question presented—a decision by an outstanding authority on the interpretation of Indian treaties and laws."

The Van Devanter opinion was withdrawn, *but never repudiated*, and the Secretary, following the Comptroller's decision, continued to pay Seminole tribal income to the tribal officers in violation of Section 19. Thus the very

*For the convenience of the court we have printed the decision of the Comptroller in the Creek matter in the Appendix to this brief, page 75.

purpose of this legislation was wholly disregarded, and as the lower court states (Rec. 25), the continuation of the "'irreparable wrongs and outrages upon a helpless people' was made possible."

The Petitioner states (Pet. Br. 51) that it does not *disagree* with the result reached by Assistant Attorney General Van Devanter, and attempts to explain away his opinion. This opinion is direct and plain, and applies to *all* Seminole moneys, and if petitioner does not disagree with it no issue is now before this court on this question—it is conceded in favor of respondent's position.

The petitioner further contends (Pet. Br. 57) that Congress impliedly ratified the acts of the Secretary of the Interior in violating the plain language of Section 19, by continuing to make appropriations for the payment of interest on the Seminole trusts after the Secretary's action had been reported to it. The reports relied upon by petitioner (Pet. Br. 56) were those made to the Commissioner of Indian Affairs, and not to Congress directly, and there is no showing that Congress ever had them under consideration. An examination of the appropriation acts covering this period, cited by petitioner (Pet. Br. 57), shows clearly that Congress not only did not ratify, either expressly or impliedly, these illegal payments, but in each of these appropriation acts Congress provided that this income be paid *in accordance with* the Seminole treaties—*paid by the United States for the specific purposes*—the manner of disbursement provided in Section 19.

THE QUESTION OF ADMINISTRATIVE CONSTRUCTION.

The petitioner further contends that the administrative construction of the Curtis Act has been consistent, and therefore should be followed by the court (Pet. Br. 57). We will analyze this contention for the court in the light of the record before us.

The only administrative construction of the *language* of Section 19, is found in the decision of the Comptroller in the Creek matter (5 Comp. Dec. 93), and that part of his decision dealing with this phase of the question is quoted *supra* at page 33. As we have seen, the petitioner in the Creek case based its defense on this broad construction, but now takes a diametrically opposite view of Section 19 in an effort to avoid this broad construction.

It is upon Comptroller Mitchell's decision of August 23, 1898, in this Seminole case, holding that Section 19 is repealed by the Seminole Agreement, that petitioner evidently bases its contention that the administrative construction of the Seminole Agreement should be followed. However, from the very inception of this question there has been a divergence of opinion upon it, and, therefore, the administrative construction was most inconsistent, and not consistent, as contended by petitioner.

To answer this contention of petitioner let us continue our narrative of what happened in regard to these opinions and bring it to an almost unbelievable conclusion. Disregarding the Van Devanter opinion, the Secretary refused to disburse these funds himself, turning them over to the Seminole tribal officials until the fiscal year 1907, when the Act of April 26, 1906, c. 1876, 34 Stat. 137, became effective.

The Act of 1906 was a general law applying to all of the Five Civilized Tribes, and under it the Secretary was given control over the tribal schools and the right to pay certain claims. The Secretary then asked the Comptroller the following question:

> "1. Whether, under the provisions of sections 11 and 28 of the act of April 26, 1906 (34 Stat., 137), expenditures from the tribal funds and distribution of annuities arising therefrom to members of the Seminole tribe should be made by the tribal authorities of the Seminole Nation or under the direction of the Secretary of the Interior."

The Comptroller replied (App. Pet. Br. 39), referring to and reaffirming his decision of August 23, 1898, which overrules the Van Devanter opinion, and following the same reasoning and quoting this earlier decision, held that a part of the funds should be turned over to Brown, *et al.*, but that the Act of 1906, being so specific, required that the Secretary disburse a part of these funds for certain specific purposes.

Dissatisfied with "half a loaf", and reversing the order of their former proceeding of having the question referred from the Assistant Attorney General to the Comptroller, Brown and Crawford now got the question referred from the Comptroller to the Attorney General.* They attacked the constitutionality of the Act of 1906, which deprived them of a part of these Seminole funds. Passing upon all the questions involved, and unswayed by political influence, Attorney General Bonaparte (26 Op. Attys. Gen. 340) held that none of the Seminole funds were to be turned over to Brown, *et al.*, but that all of these funds were to be disbursed by the Secretary. Thenceforth the Secretary disregarded the Comptroller's decision, and followed the Attorney General's opinion, disbursing all of these funds himself, and our cause of action ceases.

Let us call attention to the fact that in this last decision, while another and later act had entered into the matter, the Comptroller followed exactly the same reasoning he used in overruling the Van Devanter opinion—in fact, he quoted that former decision and made it a part of this later one, thus affirming it. While Attorney General Bonaparte does not mention Section 19 or pass upon the effect of it, for a later statute is involved, his line of reasoning is very much the same as that used by Assistant Attorney General Van Devanter. And finally the Comptroller is forced to come to the same conclusion as did Attorney General Bonaparte (Resp. Br. Opp. Certi. 27).

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*The Attorney-General's opinion (26 Op. Attys.-Gen. 340) shows that John J. Brown, principal chief of the Seminoles, raised the questions passed upon therein.

From what we have thus before us it strikes us most forcibly that the Comptroller could not have been right the first time and Justice Van Devanter wrong, if the Comptroller was wrong the second time, and Attorney General Bonaparte right.

As we have seen, in both this case and the Creek case, supra, there was a Comptroller's decision holding that, after the ratification of the Creek and Seminole Agreements, Section 19 of the Curtis Act was inapplicable. In the Creek case the Secretary of the Interior had this Comptroller's decision (5 Comp. Dec. 93) upon the effect of Section 19 for his guidance, but he entirely disregarded it after the Creek Agreement of 1901 became effective, and continued to disburse Creek funds under Section 19 instead of paying them over to the Creek tribal officials. We refer to this Creek decision to negative any suggestion that the fact that there was a Comptroller's decision in the Seminole case should in any way distinguish it from the Creek case. As the Secretary disregarded the decision of the Comptroller in the Creek case, the mere fact that he followed a decision of that officer in the Seminole case would not clothe the latter decision with greater dignity, nor could such action affect the question before us upon its legal merits. In other words, it cannot be said that the Comptroller's decision in this case is a defense for the Secretary's action, because he disregarded Comptroller's decisions at will, disregarding one in the Creek matter, and following one in the Seminole matter.

Let us make this plain to the court: That in urging the exact similarity of the Creek and Seminole Comptrollers' decisions we refer specifically to their mutual holdings that both the Creek and Seminole Agreements repeal Section 19 of the Curtis Act, and in doing so revive the right of the tribal officials to disburse the tribal funds. We have seen that this is altogether contrary to the expressed intent of the legislators and executive officers in working out the gen-

eral scheme of abolishing the corrupt practices existing in the old tribal governments.*

Thus it is evident to the court that the Secretary of the Interior disregarded Comptrollers' decisions at will; and also that on the question of the repeal of Section 19 by the Seminole Agreement the Comptroller and Assistant Attorney General Van Devanter take different views. The lower court decided that the Van Devanter opinion was the correct one. Although the Secretary is bound by these Comptrollers' decisions, yet the courts are not so bound and may decide the question before us in accordance with the clear intent of Congress in the passage of Section 19 and the Seminole Agreement.

Under the circumstances enumerated above, we do not believe that the petitioner can successfully contend that the court should apply the rule of administrative construction. In *Houghton* v. *Payne*, 194 U. S. 88, 99, this court states as follows:

> "* * * it is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. United States v. Graham, 110 U. S. 219; United States v. Fin-

*For the sake of perhaps superfluous accuracy in our presentation let us point out to the court that the Comptroller's decision in the Creek case is based upon an erroneous assumption that Section 30 of the Curtis Act, and particularly paragraphs 35 and 38 of the Creek Agreement embodied therein, became law upon its ratification by Congress. Evidently he overlooked the provision in Section 30 which required its subsequent adoption by the tribe. As a matter of fact, this Agreement was never adopted by the Creek tribe. However, a similar Agreement was executed with the Creeks, and was approved by Congress by Act of March 1, 1901, c. 676, 31 Stat. 861. Sections 32 and 44 of this last mentioned agreement contained substantially the same provisions as were contained in the one embodied in the Curtis Act, and relied upon by the Comptroller in the Creek decision. This being true, what the Comptroller said as to the unratified Creek Agreement, in legal effect applies equally to the later ratified Agreement. We point this out merely to acquaint the court with the slightest matter that might possibly enter into the question. As Mr. Justice Van Devanter states in his opinion in the Seminole case, which is equally true in the Creek case though it is at variance with these Comptrollers' decisions, the manner of disbursement under the Seminole Agreement is the same as under Section 19 of the Curtis Act, and therefore no inconsistency exists between them; consequently no question of repeal arises.

> nel, 185 U. S. 236. Contemporaneous construction is a rule of interpretation, but it is not an absolute one. It does not preclude an inquiry by the court as to the original correctness of such construction. A custom of the department, however long continued by successive officers, must yield to the positive language of the statute. As was said in the Graham case (p. 221), 'if there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling, in its effect. But with the language clear and precise, and with its meaning evident, there is no room for construction and consequently no need of anything to give it aid. The cases to this effect are numerous'."

The language of Section 19 is clear; its intent is plainly evident from its history, and the Secretary should have followed it.

We want the court to realize fully that we are not basing our claim upon a mere technical violation of the rights of respondent. Respondent is not suing for funds of which it received a benefit, even though they were paid in violation of law. The fact is that while Congress undertook to protect the tribe from these dishonest officials, and while the officers of petitioner knew that Brown and his associates were converting the Seminole tribal funds to their own uses and keeping no account thereof, the officers of petitioner deprived the tribe of these funds by disregarding the provisions of law made for the protection of the Seminole tribe and turned the funds over to the tribal officers to be squandered and embezzled. The tribal funds simply went into a greedy maw—the funds simply disappeared, and the real owner of these funds got no benefit from them.

The protection of the tribe by preventing the looting of its funds was the vital purpose of all of this legislation. Petitioner's officers, though warned by the Van Devanter opinion, failed to afford the tribe the benefit of this protection, and continued to turn over Seminole funds to these despoilers.

It is respectfully submitted that the lower court was right in its holding (Rec. 26) that:

> "The Secretary of the Interior was therefore without legal authority to pay Seminole tribal funds into the Seminole tribal treasury. More than that he was plainly prohibited by law from doing so. The payments being clearly illegal, the plaintiff is entitled to recover the amount shown by finding XII, which is the sum of $864,702.58."

Petitioner's contention B.

The petitioner contends (Pet. Br. 58) that:

> If the payments were merely in violation of Section 19 of the Curtis Act, the Seminoles have no standing to complain of that violation since the section gave to them no right of action.

This contention is based upon petitioner's interpretation of the decision of this court in *Sac and Fox Indians of the Mississippi in Iowa* v. *Sac and Fox Indians of the Mississippi in Oklahoma, and the United States*, 220 U. S. 481. In that case no question of a deliberate violation of an act of Congress by the Secretary of the Interior is involved, but the court held that the Secretary had implicitly followed the directions of Congress in paying the *tribe* its *tribal annuities*. Thus the decision in that case has no application to the question now before us.

A careful analysis of the decision in the Sac and Fox case shows clearly that it does not support, either in fact or in principle, any such contention as petitioner advances above. This case was one in which a small *band* of Sac and Fox Indians severed their connections with the Sac and Fox *tribe*, the band thereafter living in Iowa, and the tribe living in Kansas, and later in Oklahoma. The Treaty of 1859 with the Sac and Fox *tribe* provided in substance that if the Indians who divorced themselves from the tribe did not rejoin their tribe in Kansas within one year thereafter, they would lose their treaty rights. These Indians in Iowa

did not rejoin their tribe, and therefore *lost their tribal rights.* The Sac and Fox Treaty of 1842 provided for certain annuities to be paid the *tribe,* and the Act of 1852 provided in substance that these annuities be paid directly to the *tribe.* Thereafter the Acts of March 2, 1867 and July 4, 1884 provided for a pro rata division of tribal annuities between the tribe and the band in Iowa. Later the Sac and Fox Indians in Iowa sued the United States claiming (1) that the Act of 1852 gave them a vested right as *individuals* to sue for a share of the *tribal* annuities, and (2) that the Government failed to distribute properly the moneys due them under the Acts of 1867 and 1884. As to contention (1) the court held that the Acts of 1852, 1867, and 1884 did not give the Iowa Indians as *individuals* any vested rights to sue the United States for the annuities due the *tribe;* that the Government did not deal with individuals but with tribes and that annuity promises in the treaties were promises to the tribe, and therefore the *tribe* only could complain about the failure to pay them; and that in the Acts of 1852, 1867, and 1884 there was no intimation of an intent to change the terms of the treaties so as to permit *individuals* to sue for violations of them. As to contention (2), the court held that the proof failed to support the contention that a proper distribution of the moneys had not been made by the Secretary to the Indians in Iowa.

This decision clearly shows that it is inapplicable to the Seminole case for two reasons: (1) That the Seminole *Nation* is suing in the case at bar for moneys due it which were paid by the Secretary in violation of Section 19 to tribal officers who embezzled them and who were not entitled to receive them, and that in not following Section 19 the Secretary failed to comply with a condition of the trust as dictated by Congress; and (2) that Section 19 was intended to change the manner of disbursement of Seminole funds which existed prior to its passage, in order that the Seminole Nation would be insured of the receipt of its annuities. We will discuss these points separately below.

(1)

The jurisdictional act of 1924, under which this suit was filed, authorized the *Seminole Nation* to adjudicate any and all legal and equitable claims arising under Seminole treaties and agreements, and arising or growing out of any act of Congress in relation to Indian Affairs. The Seminole Nation is suing as a *tribe*,—not as individuals who had lost their treaty rights as in the Sac and Fox case; it is suing as a tribe for the first time in its history to recover moneys due it as a tribe. Our cause of action arose because the Secretary of the Interior failed to comply with the plain mandate of Congress as expressed in Section 19 of the Curtis Act, and because of his failure so to comply, Seminole moneys were paid over to the tribal officers who were not then entitled to receive them in behalf of the tribe. These Seminole moneys were not paid to the Seminole Nation, but were paid to persons who, because of Section 19, were not representative of the tribe in the matter of the receipt and disbursement of these funds, and, therefore, these moneys were paid to the wrong beneficiary.

It is well settled that a trustee makes payments at his peril, and that a mistaken interpretation of the law is no excuse for illegal payments. Bogert, Trusts and Trustees, page 2363. The principle is stated in *Burnell* v. *United States*, 44 C. Cls. 535, 548, as follows:

> "Hence, the general rule that a trustee is bound, at his peril, to see to the proper application of the trust fund applies to the government as well as to an individual trustee. (Borcherlin's Case, 35 C. Cls. R., 312, which was affirmed by the Supreme Court, 185 U. S. R. 223). It must, therefore, be apparent that if the treasury department in the case at bar made payment out of a fund which it held in trust, through a mistake of law, to the party in law not entitled to receive the same, it transcended its authority and is responsible therefor to the rightful owner of the funds."

(2)

In this case Congress, in passing Section 19, intended to, and did plainly change the manner of disbursing Seminole trust funds, in order to insure to the Seminole Nation the benefit of them. In the Sac and Fox case no change in any prior treaty or Act of Congress was intended. In the Seminole case the payment of tribal income to the tribal officers was authorized by the Acts of 1874 and 1889. As we have seen heretofore, Congress intended by the passage of Section 19, to transfer the right to disburse Seminole funds from the tribal officers to the Secretary of the Interior.

As the lower court said concerning Section 19 (Rec. 25):

> "* * * No more wholesome or humane provision was ever written into an Indian statute, and the Seminole Indians were entitled to its protection in the distribution of all tribal income due them from the United States. This protection, however, was not afforded them, and a continuation of the 'irreparable wrongs and outrages upon a helpless people' was made possible by payment thereafter of large sums of their tribal funds to the tribal treasurer."

Petitioner's contention C.

The petitioner contends (Pet. Br. 65) that:

> If the payments were in violation of Section 19 of the Curtis Act, the Seminoles are estopped to complain, inasmuch as the payments were made at their request and with their consent.

This contention was raised for the first time in the court below when it became a part of petitioner's first motion for new trial. As this contention, and the adequate answer to it, would arise out of the facts, many of which are not in the record, but which were before the lower court, it is difficult to enter into a thorough discussion of this question. Suffice it to say that the lower court, having all of the facts

before it—including a protest of the Seminoles to the continuation of payments of their tribal income to the tribal officers after Section 19 was passed—thought there was no merit to this contention and overruled it.

This contention assumes, without proof in the record, (1) that the illegal payments were made at the request and with the consent of the Seminole Nation, and (2) that the Seminole Nation received the benefit of them. In effect, this contention amounts to this: That after Congress has prohibited payments of tribal moneys to the tribal officials these officers are, nevertheless, agents of the tribe to receive them; in other words, that Congress cannot bind these tribal officers so as to prevent payments of Seminole moneys to them.

The petitioner relies upon a statement of Comptroller Mitchell in his decision of August 23, 1898, to the effect that the Seminole tribe insisted that the tribal income be paid into the tribal treasury after Section 19 was passed. It is evident to the court that these *unscrupulous tribal officials insisted* that these payments should continue to be made to them, and it was through the efforts of these tribal officials that the Comptroller rendered this decision. The efforts of the tribal officers to prevent the application of Section 19 to them could not bind the tribe, for under this section these officials ceased to be representative of the tribe in the matter of the receipt and disbursement of the tribal income. Therefore, their acts could not work out an estoppel against the tribe. The doctrine of estoppel is a salutary one, and is applied to prevent fraud and not to shield it; and therefore it is submitted that this doctrine could not properly be applied to excuse the petitioner from its violation of the law as laid down in Section 19, thus aiding the continuation of frauds committed upon the tribe by the tribal officers.

Whatever relief the Seminole tribal officials desired from the operation of Section 19 should not have been through

administrative action, but through further legislation by Congress. With the doors of Congress closed to them they set about to avoid Section 19 by the only means left to them. They first asked the Secretary for an opinion, and this request resulted in the Van Devanter opinion. This opinion being adverse to them, they had the question transferred to the Comptroller, who overruled the Van Devanter opinion. When the same question came up under the Act of April 26, 1906, the same course was followed. The Comptroller rendered the first opinion, and not being satisfied with the result, Chief Brown had the matter transferred to Attorney General Bonaparte, who overruled the Comptroller. All of these efforts were made by these officers in order that they might continue to use the tribal funds for their own private purposes, as they had done before the passage of Section 19 of the Curtis Act.

Congress, in Section 19, prohibited the Secretary from continuing to pay over these funds to the tribal officers. In the face of this positive prohibition by Congress, and all of the history behind it, petitioner cannot now say that it lacked knowledge of the facts, or was misled by any acts of the Seminole tribe. It is a well established principle of law that:

> "As a corollary to the proposition that the party setting up an estoppel must have acted in reliance upon the conduct or representations of the party sought to be estopped, it is as a general rule essential that the former should not only have been destitute of knowledge of the real facts as to the matter in controversy, but should have also been without convenient or ready means of acquiring such knowledge. One relying on an estoppel must have exercised such reasonable diligence as the circumstances of the case require. If he conducts himself with a careless indifference to means of information reasonably at hand or ignores highly suspicious circumstances which should warn him of danger or loss he cannot invoke the doctrine of estoppel." 21 C. J. 1129-1130.

Therefore, it is respectfully submitted that the unauthorized efforts of the Seminole tribal officers in securing the erroneous Comptroller's decision, coupled with the illegal action of the Secretary in following this decision, could not lawfully defeat the purposes intended to be accomplished by Congress in the passage of Section 19 of the Curtis Act.

Petitioner's Contention III.

The petitioner contends (Pet. Br. 66) that:

> The Government is not liable to the Seminoles for the $57,500 which it paid out of the trust funds established by Article III of the Treaty of 1866 to the tribal treasurer from 1875 to 1898 inclusive.

The petitioner then sets up the provision of Article III of the Treaty of 1866 which requires that the $2,500 annual interest on the $50,000 fund be paid annually for the support of schools. The lower court found that during the period from 1875 to 1898, inclusive, the Government paid the annuity direct to the tribal treasurer (Rec. 13, fdg. IX). Notwithstanding this plain violation of this treaty provision, petitioner contends "that this payment was perfectly proper and in accordance with the treaty" (Pet. Br. 67). It is difficult for us to follow this reasoning of petitioner.

The claim for this $57,500 of the income from the $50,000 fund established by the Treaty of 1866 for school purposes, arose out of the misapplication by petitioner of the Act of April 15, 1874, c. 97, 18 Stat. 29, to these funds. The Act of 1874 clearly applied only to funds arising out of Article VIII of the Treaty of 1856. The lower court in its opinion (Rec. 22), states as follows:

> "* * * Neither the Act of 1874, nor any subsequent act of Congress, conferred authority on the Secretary of the Interior to disburse moneys due the plaintiff tribe under the Treaty of 1866 in any manner other than that provided in the Treaty.

> "The Treaty provided that the interest on the permanent school fund of $50,000 be then 'paid annually and appropriated to the support of schools.' Congress never authorized disbursements of this fund to be otherwise made. * * *"

Therefore, this provision of the Treaty of 1866 was never performed by petitioner. Furthermore, Section 2097 of the Revised Statutes (quoted, *supra*, p. 15) prohibited disbursements in any other manner. In granting recovery on this item the lower court simply applied the rule that the respondent is entitled to have the full amount due it under the terms of its treaty disbursed in the manner and for the precise purposes named in the treaty unless Congress by subsequent legislation provides that payments be otherwise made. The lower court (Rec. 20) answers petitioner's contention when it aptly states that "It is no defense to say, even if the fact was shown, that they were paid out for other purposes for which the tribe received the benefit." We discuss this phase of the case later under the matter of credits claimed by petitioner (pp. 66-67).

Here again petitioner attempts to argue that respondent consented to this treaty violation. No such consent is set forth in the record. We simply have before us a plain violation of this treaty provision, of which respondent, being under a disability, was unable to complain. When Congress passed the jurisdictional act of 1924 permitting respondent to present any and all legal and equitable claims arising and growing out of any of its treaties with the United States, and waived the statute of limitations, this disability was raised, and for the first time in its history the Seminole Nation was permitted to sue for violations of these treaty provisions. That Congress permitted respondent to do this is not open to question by petitioner, as this is a question of legislative policy.

Petitioner's Contention IV.

The petitioner contends (Pet. Br. 68) that:

> The Government is not liable to the Seminoles for the $154,455.30 which it paid from 1920 to 1930 inclusive out of the principal of the $500,000 trust fund set apart by the Seminole Agreement of 1897.

The question presented resolves itself into a simple one: whether or not Congress modified by subsequent legislation the terms of the Seminole Agreement so as to permit payments from the principal of the permanent school fund during the fiscal years 1920 to 1930, the period covered by the claim.

The Seminole Agreement of 1897, ratified by Act of July 1, 1898, c. 542, 30 Stat. 567, 568, provided as follows:

> "Five hundred thousand dollars ($500,000.00) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five per cent interest, or invested so as to produce such amount of interest, which shall be, after extinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of the Seminole people; and there shall be selected and excepted from allotment three hundred and twenty acres of land for each of said academies and eighty acres each for eight district schools in the Seminole country."

Commenting upon this provision, the lower court states as follows:

> "The fund under the provisions of the agreement was to be a 'permanent school fund' for the education of children of members of the Seminole tribe, the Secretary of the Interior being authorized to apply only the interest thereon for that purpose. He could not under the terms of the agreement expend any part of the principal fund for education or for any other purpose." (Rec. 27.)

Petitioner contends (Pet. Br. 70) that the Act of May 25, 1918, c. 86, 40 Stat. 561, 580, modified the terms of the Seminole Agreement, and authorized such payments, and that the authorization in this act continued over the period covered by this claim—from the fiscal years 1920 to 1930. This Act provided in part as follows (*supra*, 580, 581):

> "That the Secretary of the Interior be, and he is hereby, authorized to pay to the enrolled members of the Seminole Tribe of Indians of Oklahoma entitled under existing law to share in the funds of said tribe, or to their lawful heirs, out of the *Seminole school fund*, or any moneys belonging to said tribe in the United States Treasury or deposited in any bank or held by an official under the jurisdiction of the Secretary of the Interior, not to exceed $100 per capita: Provided, That said payment shall be made under such rules and regulations as the Secretary of the Interior may prescribe: * * *"
>
> * * * * * * * * * *
>
> "* * * Provided further, That during the fiscal year ending June thirtieth, nineteen hundred and nineteen, no moneys shall be expended from tribal funds belonging to the Five Civilized Tribes, without specific appropriation by Congress, except as follows: Equalization of allotments, per capita and other payments authorized by law to individual members of the respective tribes," etc.

We readily admit that the Act of 1918 specifically authorized a per capita payment out of this Seminole School Fund principal during the fiscal year *1919*, and no claim was made for the amount so disbursed. However, the authorization in this act applied to the fiscal year *1919* only, and did not continue beyond the close of this fiscal year—June 30, 1919. Respondent's claim began with the fiscal year *1920*, and it is our contention that the remaining balance of this fund was subject to the original law governing this school fund as provided in the Seminole Agreement, and that no act of Congress specifically authorized a further depletion of the

balance of the principal of this fund during the period covered by this claim.

The Seminole Nation had two tribal schools, the Emahaka and Mekasuky Academies, which were supported out of the income from the Seminole School Fund. Because of an erroneous survey of the division line between the Creek and Seminole Nations, the Emahaka Academy had been built mostly on Creek, instead of Seminole lands. Thereafter the land upon which the school was built was allotted to a Creek Indian, who sold it to one Ferguson. The United States sued to cancel the deed to Ferguson claiming that the Creek allottee was a full-blood, that this land was restricted and therefore inalienable. Because of the unsuccessful outcome of this litigation the Emahaka Academy was abandoned. (See *United States* v. *Ferguson*, 247 U. S. 175). This left Mekasuky Academy only to be supported out of the income of the Seminole School Fund, and it was thought that after the reduction of the principal by the per capita payment in the fiscal year 1919, sufficient of the principal would be left in the fund to provide income enough to support this remaining school.

As the Indian Appropriation Act of May 25, 1918 applied to the fiscal year *1919 only*, subsequent legislation must be examined to determine whether or not Congress authorized further reductions of the remaining principal of the Seminole School Fund.

Petitioner contends that the Act of June 30, 1919, c. 4, 41 Stat. 3, 23, appropriating for the fiscal year 1920 (the year in which our claim began), provides such authority. This act generally provides:

> "That during the fiscal year ending June 30, 1920, no moneys shall be expended from tribal funds belonging to the Five Civilized Tribes, without specific appropriation by Congress, except as follows: Equalization of allotments, per capita and other payments authorized by law to individual members of the respective tribes."

A comparison of the language of this provision with that of the Act of May 25, 1918, quoted *supra,* shows clearly the difference in these two authorizations, and it becomes most evident that the language of the Act of June 30, 1919, does not authorize further depletions of the principal of the Seminole School Fund.

Then, too, similar general provisions to that contained in the Act of June 30, 1919, are contained in each of the annual appropriation acts beginning with the Act of August 24, 1912, c. 388, 37 Stat. 518, 531, which provides as follows:

> "That during the fiscal year ending June thirtieth, nineteen hundred and thirteen, no moneys shall be expended from the tribal funds belonging to the Five Civilized Tribes without specific appropriation by Congress, except as follows: Equalization of allotments, per capita and other payments authorized by law to individual members of the respective tribes."

Had Congress intended to reduce further the principal of the Seminole School Fund in the act of June 30, 1919, it would not have reverted to the general language contained in the regular appropriation acts from 1912 on, but would have specifically provided for such reduction, as was done in the Act of May 25, 1918. Under the provisions of these appropriation acts *specific appropriations* were required before the principal of the Seminole School Fund could be further lawfully reduced. Petitioner has pointed out no such specific authority.

Petitioner further relies upon the general authorizations in the annual Indian appropriation acts (beginning with the Act of May 18, 1916, c. 125, 39 Stat. 123, 148) giving the Secretary the right to continue tribal schools of the Five Civilized Tribes from tribal funds. These provisions, insofar as they affect Seminole funds generally, authorized payments for Seminole schools from general funds of the tribe, which were used together with the interest on the Seminole School Fund, for the continuance of schools. However, there is no specific authority in such provisions for

depletions of the Seminole School Fund *principal*. The intent of these provisions would seem to be directly to the contrary, for to reduce further the principal of the permanent school fund would cut off the income therefrom, and would accordingly reduce the means by which the remaining school of the Seminoles might be continued.

Let us impress upon the court that the "Seminole School Fund," which is governed by the provisions of the Seminole Agreement, is a *special* fund set aside for a special purpose—that of providing sufficient income permanently for the education of the Seminoles. Unlike other general Seminole funds, this school fund was not available for general disbursements. Therefore, the general authorizations in the yearly appropriation acts to pay per capita payments, etc., and to continue tribal schools, from moneys of the Five Civilized Tribes, relied upon by petitioner, could have no possible application to the Seminole School Fund, and would not authorize depletions of the principal of this fund. Congress would have to act specifically to do so.

We believe that the lower court completely answers petitioner's contention as follows (Rec. 27):

> "That Congress had the power to change the terms of the agreement and authorize these payments is well established, but we find no act of Congress that either in express terms or by necessary implication authorized any of them."

Petitioner's Contention V.

The petitioner contends (Pet. Br. 74) that:

> The Government is not liable to the Seminoles for $9,068.24 on account of its promise, under Article VI of the Treaty of 1866, to construct agency buildings.

This contention, in effect, is that when petitioner promises to expend not to exceed $10,000 to construct agency buildings within the Seminole Nation, it may or may not conform to its treaty promise, as it so pleases. The lower court

held that petitioner was bound by its treaty promise, and was obligated to construct these agency buildings, and that petitioner was liable to respondent when it did not do so but instead misspent the amount appropriated by Congress for this treaty purpose.

The obligation of the Government under Article VI of the Treaty of 1866 was part of the consideration for a cession by the Seminole Nation to the United States of 2,169,080 acres of land (Article III, Treaty of March 21, 1866, 14 Stat. 755). This money was due and owing to the Seminoles, and they gave their land for it. The sole question now before us is whether the Government conformed to its treaty promise to them.

The lower court permitted recovery in the amount of $9,068.24, the difference between the $10,000 obligation, and $931.76 expended for agency buildings and repairs (Rec. 22, 23), after the court found that $9,030.15 of the $10,000 appropriated by Congress had been misspent. The court found the facts as follows:

> "It does not appear for what purpose the $9,030.15 expended out of this appropriation was used, but it was not used for the purpose of erecting agency buildings." (Finding XI; Rec. 14).

The facts also disclosed that Congress appropriated $10,000 in the Act of July 28, 1866, c. 296, 14 Stat. 310, 319, to fulfill this treaty obligation, but this sum was not used and was returned to surplus. Congress again appropriated $10,000 to replace the amount returned to surplus, in the Act of May 18, 1872, c. 172, 17 Stat. 122, 132. Congress having twice fixed the amount of this obligation at $10,000 (Finding XI; Rec. 13, 14), the amount of this obligation became definite. It is respectfully submitted that the small payment of $931.76, paid for agency buildings and repairs out of another general appropriation, and not out of the $10,000 appropriation, would not be a substantial compliance with this treaty promise.

As this money was misspent by petitioner's officers after it was appropriated by Congress to fulfill this treaty obligation, recovery for this item could also be sustained for a violation of Section 2097, Rev. Stat. quoted *supra*, page 15.

Petitioner's Contention VI.

The petitioner contends (Pet. Br. 77) that:

> The Government is not liable to the Seminoles for $61,563.42 on account of its promise in Article VIII of the Treaty of 1856 to provide annually for ten years $3,000 for the support of schools, $2,000 for agricultural assistance, and $2,200 for the support of smiths and smith shops.

To support this contention petitioner relies upon (1) the Resolution of February 22, 1862, No. 13, 12 Stat. 614, (2) the provisions of the annual Indian Appropriation Acts from 1862 to 1866, inclusive, and (3) the release in the Treaty of 1866.

The petitioner assumes without proof anywhere in the record that the moneys appropriated to pay these obligations of United States under Article VIII of the Treaty of 1856, were disbursed for refugee Indians. There was no proof in the record below that such was the case, and no finding to that effect was made by the court below (Findings III, IV; Rec. 10, 11).

Refugee Indians, as referred to by petitioner, means Indians of various tribes who had fled into Kansas during the Civil War after this war had victimized them and reduced them to poverty (R. 19). Of a total of $249,731.88 of Seminole moneys diverted during the period of the Civil War—from the fiscal years 1862 to 1866—$31,599.68 only was disbursed for *Seminole* refugees (G. A. O. Rep. p. 28-29). Therefore, the contention of petitioner amounts to saying that this money was confiscated by the Acts of Congress it cites.

The Resolution of February 22, 1862, would no doubt authorize diversions of Seminole annuities for *Seminole*

refugees, but it is submitted that this resolution would not authorize diversions of Seminole moneys for other refugee Indians, not Seminoles; nor by a fair and reasonable construction of the Acts of 1862 to 1866, would Indians other than Seminoles be benefited by payments from Seminole funds.

Concerning the Acts of 1862 to 1866, the lower court states as follows:

> "The act of July 5, 1862, *supra,* was operative only 'during the discretion and pleasure of the President.' It is not shown that the President ever took any action under this statute either by declaring by proclamation the abrogation of 'all treaties' with the Seminoles, or by directing that 'appropriations heretofore or hereafter made' to carry into effect treaty stipulations with them 'be suspended and postponed wholly or in part.' Without action on the part of the President the act by its own terms was ineffective." (Rec. 17.)

Therefore, these acts were never in force as to the Five Civilized Tribes. Upon being urged to act President Lincoln refused and withheld judgment in the matter, and therefore these acts need not now be considered. (See American Indian under Reconstruction, by Dr. Annie Heloise Abel, Lib. Cong., Call No. E540.13A22, notes 496 and 497, pages 251-252).

Before the beginning of the Civil War (1861), and before there was any idea that the Five Civilized Tribes might become involved in it, the petitioner had become indebted to respondent under the above treaty provisions for substantially all of the above amount of $61,563.42. This sum, with no thought of the Civil War, it simply failed to pay in accordance with the treaty provisions. Diversions of Seminole funds for refugee Indians did not begin until the fiscal year 1862, and this amount due the Seminoles under these treaty obligations had accrued before the beginning of "the diversion of annuities" mentioned in the release contained in the Treaty of March 21, 1866, relied upon by petitioner.

We believe that the lower court sufficiently answers the last contention under this release as follows (Rec. 18):

> "* * * The general language, 'The stipulations of this treaty are to be a full settlement of all claims of said Seminole Nation for damages and losses of every kind growing out of the late Rebellion', has no application and cannot be held to include this item of the Seminole claim for the reason that substantially the whole amount claimed was due and unpaid before the outbreak of the war and consequently is not one for 'damages and losses growing out of the War of the Rebellion.' The simple facts are that the United States covenanted with the Seminole Tribe in article VIII of the treaty of 1856, as a part of the consideration for the treaty, to provide annually for them for a period of ten years fixed sums for the support of schools, for agricultural assistance, and for the support of smiths and smith shops among them. In the absence of subsequent specific enactment by Congress to the contrary, the United States was obligated to disburse the funds stipulated in the manner and for the purposes designated in the treaty. The United States failed to discharge this treaty obligation in full, having disbursed only a part of the amount for the purposes named in the treaty. The plaintiff tribe is entitled to recover the undisbursed balance of $61,563.42."*

Petitioner's Contention VII.

The petitioner contends (Pet. Br. 88) that:

> The Government is entitled to have set off against its underpayments of amounts due in some years under Article VIII of the Treaty of 1856 and Article III of the Treaty of 1866 the amounts by which in other years it made overpayments or miscellaneous payments on those and other treaty obligations.

*The release in the Treaty of 1866 defeated a claim of respondent for $150,000 diverted for refugee Indians during the period covered by the Civil War—fiscal years 1862-1866. (Item 2, Finding V, Rec. 18.) The petitioner is now complaining about the claim allowed by the lower court which accrued *prior* to the Civil War period, and is attempting to stretch the conditions prevailing during this period so as to include a claim which arose prior to that time.

The substance of petitioner's argument is that the lower court erred (1) in holding that it "had no jurisdiction to decide whether the Government was entitled to an offset because no counterclaim was pleaded, and (2) in refusing to make certain findings of fact as to overpayments or other miscellaneous payments for which petitioner claimed credit.

That the lower court's decision is based upon more substantial reasons than those stated by petitioner, is evident from its opinion. The court denied this contention for the reasons that (1) the special jurisdictional act under which this suit was brought does not permit such offsets, and (2) it was not established that plaintiff received the benefit of the payments. The lower court states as follows (R. p. 19):

> "The defendant says that even if the funds in question were not disbursed in strict accordance with the terms of the treaty, they were expended for the benefit for the plaintiff tribe, and that no damage resulted to the tribe from the 'diversion' of the funds, even if unauthorized. It is urged that if the United States be technically liable, the tribe having received the benefit of the expenditures, there arises in favor of the United States an equitable counterclaim for the same amount, which the court under section 3 of the jurisdictional act is authorized to pass upon. This contention was urged under like circumstances in The Creek Nation v. United States, *supra,* and was rejected by the court. Section 3 of the jurisdictional act authorizes the court to 'hear, examine, consider, and adjudicate any claims which the United States may have against said Indian Nation.' 'Claims' as used in the section, of course, can mean only legal claims which the United States asserts by way of counterclaim. The United States has asserted no counterclaim, hence there is no claim against the plaintiff tribe which the court is authorized to 'hear, examine, consider, and adjudicate.' Even if the plaintiff received the benefit of the payments, and that fact is not established, they were payments made outside of the provisions of the treaty and as such were gratuities which the court under the jurisdictional act is

without authority to offset against the plaintiff's claim."

In some of the jurisdictional acts in these Indian cases, gratuity offsets are permitted against valid claims. See The Blackfeet Indians case, 81 C. Cls. 101, wherein it is held (*supra*, p. 137) that overpayments of treaty obligations are gratuities, and therefore are offsets under the jurisdictional act in that case. See also The Klamath Indians case, 81 C. Cls. 79. However, no such provision for gratuity offsets is contained in the Seminole jurisdictional act, under which this suit was instituted.

The petitioner has gone outside of the record to set up certain of these items of credit claimed by it, in an attempt to obtain a retrial of the facts in this court. These disputed questions of fact were settled by the lower court when these matters were fairly and completely fought out before it. The petitioner admits (Pet. Br. 89) that the lower court *refused* to make the findings requested. In order to answer properly petitioner's contentions as to these items, we would have to resort to considerable of the evidence filed in the court below. We do not feel justified in doing so in view of the decisions of this court that it will not go behind or review the findings of fact of the Court of Claims. *Sac and Fox Indians* v. *United States*, 220 U. S. 481, 488; *The Sisseton and Wahpeton Indians*, 208 U. S. 561, 566; *Jacob Reed's Sons* v. *United States*, 273 U. S. 200, 202; *Luckenback S. Co.* v. *United States*, 272 U. S. 533, 539-540.

The general law cited by petitioner wherein the trustee has certain discretionary powers, and can make payments for his ward's necessities, is not applicable to the case at bar. However, in the Seminole case the Secretary of the Interior has no discretion in the matter of disbursement of Seminole funds, but is bound by the provisions of treaties and acts of Congress governing these disbursements. The Secretary cannot lawfully disburse Indian funds for purposes other than those stated in the treaties and specific

acts of Congress. As the court has held in the Creek case, to hold otherwise would be equivalent to holding that the Secretary of the Interior and not *Congress* had administrative control over the affairs of Indian tribes (*supra*, p. 5).

CONCLUSION.

It is respectfully submitted that the Court of Claims did not err in granting recovery to the Seminole Nation for the illegal disbursement of its treaty and trust funds, and that its decision should be affirmed for the reasons heretofore mentioned.

Respectfully submitted,

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(J. B. Campbell, deceased)

APPENDIX.

Extracts from Report of Dawes Commission, dated July 25, 1894

Propositions to the Seminoles

Fifth. All invested funds, not devoted to school purposes, and all moneys derived from the sale of town sites, coal and minerals, as well as all moneys found due from the United States, to be divided per capita among the citizens according to their respective rights under the treaties and agreements.

Sixth. All moneys due the citizens of said nation except that devoted to school purposes, to be paid per capita to the citizens entitled thereto by an officer of the United States, to be appointed by the President.

* * * * * * * * * *

Early interviews with us by Commissioners appointed by the several tribes, and with citizens satisfied us that the Indians would not, under any circumstances, agree to cede any portion of their lands to the Government, but would insist that if any agreements were made for allotment of their lands it should all be divided equally among them. Among other reasons assigned, it was stated that a cession to the United States would likely make operative and effective the various railroad grants; that they preferred each to sell his share of the lands and receive the money for it, as if ever their lands were converted into money it would go into the hands of the officers of the tribe, who would swindle them out of a large portion of it. * * *

* * * * * * * * * *

* * * Corruption of the grossest kind, openly and unblushingly practiced, has found its way into every branch of the service of the tribal governments. All branches of the governments are reeking with it and so common has it become that no attempt at concealment is thought necessary. The governments have fallen into the hands of a few able and energetic Indian citizens, nearly all mixed blood and adopted whites, who have so administered their affairs and have enacted such laws that they are enabled to appropriate to their own exclusive use almost the entire property

of the Territory of any kind that can be rendered profitable and available.

* * * * * * * * *

The large payments of moneys to the Indians of these tribes within the last few years have been attended by many and apparently well-authenticated complaints of fraud, and those making such payments, with others associated with them in the business, have, by unfair means and improper use of the advantages afforded them, acquired large fortunes, and in many instances private persons entitled to payments have received but little benefit therefrom. And worse still is the fact that the places of payments were thronged with evil characters of every possible caste, by whom the people were swindled, defrauded, robbed, and grossly debauched and demoralized. And in case of further payments of money to them the Government should make such disbursements to the people directly through one of its own officers.

* * * * * * * * *

Justice has been utterly perverted in the hands of those who have thus laid hold of the forms of its administration in this Territory and who have inflicted irreparable wrongs and outrages upon a helpless people for their own gain. The United States put the title to a domain of countless wealth and unmeasured resources in these several tribes or nationalities, but it was a conveyance in trust for specific uses, clearly indicated in the treaties themselves, and for no other purpose. It was for the use and enjoyment in common by each and every citizen of his tribe, of each and every part of the Territory, thus tersely expressed in one of the treaties: "To be held in common, so that each and every member of either tribe shall have an equal undivided interest in the whole." The tribes can make no other use of it. They have no power to grant it to anyone, or to grant to anyone an exclusive use of any portion of it. These tribal governments have wholly perverted their high trusts, and it is the plain duty of the United States to enforce the trust it has so created and recover for its original uses the domain and all the gains derived from the perversions of the trust or discharge the trustee.

The United States also granted to these tribes the power of self-government, not to conflict with the Constitution.

They have demonstrated their incapacity to so govern themselves, and no higher duty can rest upon the Government that granted this authority than to revoke it when it has so lamentably failed.

Extracts from Report of Dawes Commission, dated November 18, 1895

A greater familiarity with the condition of affairs in the Territory than the Commission had at the time of making their last report, does not enable it to abate anything of its representation of the deplorable state of affairs as therein stated. They are not only compelled to reaffirm all that they reported of the utter perversion of justice by those who have gotten possession of the machinery and funds of its administration in the Territory, inflicting in its name and that of the law-making power irreparable wrongs and outrages upon a helpless people for their own gain, but they are compelled to report that statistics and incontrovertible evidence shows a much more deplorable and intolerable state of affairs than was there represented.

* * * * * * * * *

The Commission is compelled to report that so long as power in these nations remains in the hands of those now exercising it, further effort to induce them by negotiation to voluntarily agree upon a change that will restore to the people the benefit of the tribal property and that security and order in government enjoyed by the people of the United States will be vain.

The Commission is therefore brought to the consideration of the question: What is the duty of the United States Government toward the people, Indian citizens and United States citizens, residing in this Territory under governments which it has itself erected within its own borders?

No one conversant with the situation can doubt that it is impossible of continuance. It is of a nature that inevitably grows worse, and has in itself no power of regeneration. Its own history bears testimony to this truth. The condition is every day becoming more acute and serious. It has as little power as disposition for self-reform.

Nothing has been made more clear to the Commission than that change, if it comes at all, must be wrought out by the authority of the United States. This people have been

wisely given every opportunity and tendered every possible assistance to make this change for themselves, but they have persistently refused and insist upon being left to continue present conditions.

There is no alternative left to the United States but to assume the responsibility for future conditions in this Territory. It has created the forms of government which have brought about these results, and the continuance rests on its authority. Knowledge of how the power granted to govern themselves has been perverted takes away from the United States all justification for further delay. Insecurity of life and person and property increasing every day makes immediate action imperative.

The pretense that the Government is debarred by treaty obligations from interference in the present condition of affairs in this Territory is without foundation. The present conditions are not "treaty conditions." There is not only no treaty obligation on the part of the United States to maintain, or even to permit, the present condition of affairs in the Indian Territory, but on the contrary the whole structure and tenor of the treaties forbid it. If our Government is obligated to maintain the treaties according to their original intent and purpose, it is obligated to blot out at once present conditions. It has been most clearly shown that a restoration of the treaty status is not only an impossibility, but if a possibility, would be disastrous to this people and against the wishes of all, peoples and governments alike. The cry, therefore, of those who have brought about this condition of affairs, to be let alone, not only finds no shelter in treaty obligations but is a plea for permission to further violate those provisions.

The Commission is compelled by the evidence forced upon them during their examination into the administration of the so-called governments in this Territory to report that these governments in all of their branches are wholly corrupt, irresponsible, and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect.

There can be no higher obligation incumbent upon every branch of the General Government than to exert its utmost constitutional authority to secure to this people, in common with all others within our borders, government in con-

formity with constitutional authorities. The Government cannot abdicate or transfer to other shoulders this duty as to any portion of territory or people in the land. It cannot escape responsibility if the dark record which has now been brought to light is permitted to continue. Delay can bring nothing but increased difficulty and danger to peace and good order in the Territory. The situation calls for prompt action. These considerations lead but to one conclusion.

It is, in the judgment of the Commission, the imperative duty of Congress to assume at once political control of the Indian Territory. They have come with great reluctance to this conclusion, and have sought by all methods that might reach the convictions of those holding power in the Territory to induce them by negotiation and mutual agreement to consent to a satisfactory change in their system of government and appropriation of tribal property. These efforts have failed, and the Commission is driven to the alternative of recommending abandonment of these peoples to the spoliation and outrages perpetrated in the name of existing governments or the resumption by Congress of the power thus abused.

Extracts from report of Dawes Commission, dated October 3, 1898.

"In the meanwhile, in contemplation of the conditon in which the Territory would be left by the possible failure to ratify pending agreements, Mr. Curtis, of the Indian Committee of the House, addressed himself to the preparation of a bill, the general design of which would be to transfer the control of the property rights in these nations from tribal authority to that of the United States, much the same as their political government had been transferred by the act which was to take effect January 1898. The result of this undertaking of Mr. Curtis, on which he bestowed much time and exhaustive labor, availing himself of all the assistance of others which he could command, has been the act entitled 'An act for the protection of the people of the Indian Territory and for other purposes,' known as the 'Curtis bill.' The knowledge of the preparation of this bill aroused great opposition of those in the Territory opposed to any change in the exclusive use of tribal property

by the few controlling the government of the Territory. Accordingly large delegations were sent to Washington, at great expense to their national treasuries, for the purpose of preventing such legislation and procuring, if possible, the repeal of the law taking away so much of their political power, which was to take effect January 1, 1898. It was deemed necessary, therefore, to require the presence of the commission in Washington during the pendency of such legislation to give information to the committees having it in charge as to the real condition of the Territory and the needs and character of the legislation proposed. At the request of these committees, and with the approval of the Department, the commission remained in Washington until final action upon this bill, rendering such assistance as was in its power to the several committees, based upon accurate and reliable information in relation to the many questions involved in the comprehensive scope of the proposed measure, as well as upon their experience and observation while in the Territory. After many changes and modifications, it is believed to have taken the best final shape possible under the circumstances."

5 Comp. Dec. 93.

Payments to Creek Indians.

The provision in the act of June 28, 1898, which prohibits the payment of any moneys by the United States to any of the tribal governments of the Indians, or to any officer thereof for disbursement does not apply to the Creek Indians, other provision of law having been made therein for payments to them.

(Assistant Comptroller Mitchell to the Secretary of the Interior, August 30, 1898.)

I have received your letter of July 23, 1898, as follows:

"The Indian appropriation act, approved July 1, 1898 (30 Stat. 571), makes the following appropriations for the Creek Nation of Indians, namely:

" 'For permanent annuity, in money, per fourth article of treaty of August seventh, seventeen hundred and ninety, and fifth article of treaty of August seventh, eighteen hundred and fifty-six, one thousand five hundred dollars;

" 'For permanent annuity, in money, per second article of treaty of June sixteenth, eighteen hundred and two, and fifth article of treaty of August seventh, eighteen hundred and fifty-six, three thousand dollars;

" 'For permanent annuity, in money, per fourth article of treaty of January twenty-fourth, eighteen hundred and twenty-six, and fifth article of treaty of August seventh, eighteen hundred and fifty-six, twenty thousand dollars;

" 'For permanent annuity for blacksmith and assistant, and for shops and tools, per eighth article of treaty of January twenty-fourth, eighteen hundred and twenty-six, and fifth article of treaty of August seventh, eighteen hundred and fifty-six, eight hundred and forty dollars;

" 'For permanent annuity for iron and steel for shop, per same articles and treaties, two hundred and seventy dollars;

" 'For permanent annuity for the pay of a wheel-wright per same articles of same treaties, six hundred dollars;

" 'For five per centum interest on two hundred thousand dollars, for purposes of education, per sixth article of treaty

of August seventh, eighteen hundred and fifty-six, ten thousand dollars;

"'For interest on two hundred and seventy-five thousand one hundred and sixty-eight dollars, at the rate of five per centum per annum, to be expended under the direction of the Secretary of the Interior, under provisions of third article of treaty of June fourteenth, eighteen hundred and sixty-six, thirteen thousand seven hundred and fifty-eight dollars and forty cents; in all, forty-nine thousand nine hundred and sixty-eight dollars and forty cents.'

"The Creek Nation is one of the Five Civilized Tribes of Indian Territory.

"The act approved June 28, 1898, entitled 'An act for the protection of the people of the Indian Territory, and for other purposes' (30 Stats., 495, 502), particularly relates to the affairs and government of these Five Civilized Tribes, and in section 19 provides:

"'That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States and the same shall not be liable to the payment of any previously contracted obligation.'

"This section as it passed the House did not contain the words 'by the United States,' following the words 'hereafter be made,' in the early part of the section, but did contain the words 'all expenses incurred in transacting their business and of,' following the words 'but payment of,' near the middle of the section. In the course of the consideration of the measure in the Senate section 19 was amended by inserting the words 'by the United States' above mentioned and by striking out the words 'all expenses incurred in transacting their business and of' above mentioned. These amendments were known in the Senate as Nos. 28 and 29, respectively, and were suggested by the Committee on Indian Affairs in that body. The bill as it passed the House was reported to the Senate by the Committee upon Indian Affairs with amendments, among which were those in question, but no written or printed report was made in explanation of the amendments suggested by the committee,

and neither were they explained upon the floor of the Senate or House. The bill went before a conference committee of the two Houses, whose favorable action led to the retention of the Senate amendments to section 19.

"Heretofore under the treaties with the Creeks the moneys appropriated in fulfillment of the treaty stipulations with that tribe have been paid under the direction of the Secretary of the Interior to the treasurer of said tribe, to be disbursed by him under the laws of said tribe.

"It will be seen that the moneys included in the appropriations in question do not necessarily go to members of the tribe and neither are they per capita payments. They are, however, payments of money on a specified account made by the United States to the tribal government or its tribal treasurer for use and disbursement. The purposes for which the appropriations are made, as shown by the appropriation act and by the treaty stipulations, are varied in character, including the support of the tribal government and the maintenance of public schools.

"The treaty of August 7, 1856, with the Creek Indians, under which several of these appropriations are made, contained the following provisions in Article VII (11 Stat., 699, 702):

" 'It being the desire of the Creeks to employ their own teachers, mechanics, and farmers, all of the funds secured to the nation for educational, mechanical, and agricultural purposes shall, as the same become annually due, be paid over by the United States to the treasurer of the Creek Nation. And the annuities in money due the nation under former treaties shall also be paid to the same officer whenever the general council shall so direct.'

"The appropriations made by the Indian appropriation act of July 1, 1898, aforesaid, are now available, and the tribe insists that they should be paid as heretofore to the tribal treasurer for disbursement, and that the moneys covered by these appropriations are not payable to members of such tribe because of their membership or by way of any per capita distribution, but that they are payable for official or other services rendered, work performed, or material furnished, as the case may be, under the laws of said tribe, made in pursuance to existing treaties, and that such appropriations do not therefore come within the purview of section 19 of the act of June 28, 1898, *supra*. The fact

that the words 'all expenses incurred in transacting their business and of' were stricken out of section 19 as it passed the House of Representatives is referred to in support of the contention of the tribe. On the other hand, attention is called to that part of said section 19 which directs 'that no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement.'

"I beg to inquire whether the moneys covered by the appropriations in question can be paid to the tribal government or its treasurer, as heretofore, or whether these appropriations come within the provisions of section 19 of the act of June 28, 1898, *supra*, and are required to be paid out or disbursed under the direction of the Secretary of the Interior by an officer appointed by him.

"In connection it is submitted that there is urgent occasion for the early application of this money to the purpose for which it was appropriated, but before action in the premises it is desired to obtain an authoritative determination as to the manner of disbursement."

"The authority of Congress to nullify a treaty by statute law seems to be well settled."

"The power to abrogate or modify a treaty does not rest exclusively in the hands of the President and Senate of the United States; but Congress, in the exercise of the law-making and law-repealing power, may render a treaty of no effect. And the courts have no right to inquire into the wisdom of such action of the legislative department of the Government. So, whether a particular law violates a treaty obligation is not a question of judicial cognizance, and the courts can not declare it void on that ground. This question addresses itself to the political department of the Government, and must be settled by international negotiation." (Am. and Eng. Law Ency., vol. 26, p. 553, and cases there cited.)

There does not seem to be room for serious doubt as to the meaning of the opening lines of section 19, of the act of June 28, 1898, *supra*. They import a plain, unqualified, and comprehensive prohibition of all payments by the United States to the tribal governments, or any officer thereof, on any account whatever for disbursement. Had the intent been simply to provide for payments to members of the tribes, either per capita or otherwise by a disbursing officer

of the United States, the prohibition found in the first three lines was unnecessary. In view of this plain prohibition I think no payments can be made to the Creek authorities if the section applies to them. Does it apply, and if so, to what extent?

The agreement made with the Creek Indians September 27, 1897, was ratified by Congress and is a part of the same act of June 28, 1898. Section 30 of the act provides:

"And if said agreement (with the Creeks) as amended be so ratified, the provisions of this act shall then only apply to said tribe where the same do not conflict with the provisions of said agreement; * * *."

Paragraph 38 of said agreement provides:

"This agreement shall in no wise affect the provisions of existing treaties between the Muscogee or Creek Nation and the United States, except in so far as it is inconsistent therewith."

Paragraph 35 of the agreement provides:

"All payments hereafter to be made to the members of the said nation shall be paid directly to each individual member by a bonded officer of the United States, * * *."

It may be that paragraph 35 is in conflict with the provisions of existing treaties, and if so the treaties must yield. In so far as payments to members, as members, of said nation are concerned. Even this would not prevent a payment to a Creek Indian for services rendered.

With the exception found in paragraph 35 of the agreement, the existing treaties remain in full force so far as payments to the tribal authorities are concerned.

Section 7 of the treaty of August 7, 1856 (11 Stat., 702), provides:

"It being the desire of the Creeks to employ their own teachers, mechanics, and farmers, all of the funds secured to the nation for education, mechanical, and agricultural purposes shall, as the same become annually due, be paid over by the United States to the treasurer of the Creek Nation. And the annuities in money due the nation under former treaties shall also be paid to the same officer whenever the general council shall so direct."

Under this provision all funds due the nation for educational, mechanical, and agricultural purposes, under the treaty of 1856 and prior treaties, can now be paid over to the treasurer of the nation; and all annuities in money due

the nation under treaties prior to that of August 7, 1856, can now be paid to said treasurer whenever the general council shall so direct, subject in all cases, however, to the exception found in paragraph 35 of the agreement ratified by the act of June 28, 1898.

The above applies to the appropriations mentioned by you in the first part of your letter, except the $13,758.40 appropriated under provisions of third article of treaty of June 14, 1866 (14 Stat., 786), being interest at 5 per cent per annum on $275,168. This article of the treaty in part provides:

"The United States agree to pay to said Indians, in such manner and for such purposes as the Secretary of the Interior may direct, * * *; the residue, two hundred and seventy-five thousand one hundred and sixty-eight dollars ($275,168) shall remain in the Treasury of the United States, and the interest thereon, at the rate of five per centum per annum, be annually paid to said Creeks as above stipulated."

Under the provisions of this treaty it rests solely with the Secretary of the Interior to determine in what manner and for what purposes this $13,758.40 shall be disposed of for the benefit of the Creeks, provided that it be not paid to the members of said nation in contravention of paragraph 35 of the agreement found in the act of June 28, 1898.

The conclusion reached, that the tribal authorities may be recognized in making payments as above stated, must be understood to apply only from and after the ratification of the agreement. Prior to that time section 19 of the act of June 28, 1898, as herein construed, applies.

SUPREME COURT OF THE UNITED STATES.

No. 172.—October Term, 1936.

The United States, Petitioner,
vs.
The Seminole Nation.

On Writ of Certiorari to the Court of Claims.

[January 4, 1937.]

Mr. Justice Butler delivered the opinion of the Court.

An Act of Congress approved May 20, 1924, 43 Stat. 133, authorized the above named court to adjudicate claims of the Seminole Nation against the United States, declared all forever barred unless suit be brought within five years, directed adjudication of claims of the United States against that nation and gave right of review in this court. A Joint Resolution of May 19, 1926, 44 Stat. 568, permitted plaintiff to bring separate suits on one or more causes of action. Joint Resolution of February 19, 1929, 45 Stat. 1229, extended time for commencing suits to June 30, 1930. February 24, 1930, plaintiff filed its petition praying judgment in respect of causes of action alleged to have arisen after July 1, 1898. Plaintiff obtained leave and, September 19, 1934, filed an amended complaint containing allegations in respect of the claims alluded to in the original petition and attempted to set up other causes of action. But the period within which defendant permitted suit had long since expired. On December 2, 1935, the court filed its special findings of fact, conclusions of law and opinion and entered judgment in favor of plaintiff for $1,317,087.27. — C. Cls. —.

1. Plaintiff contends that the petition for the writ of certiorari came too late and that therefore this court is without jurisdiction. The petition was filed under 28 U. S. C., § 288 (b). Section 350 limits the time to three months after entry of judgment. Defendant filed timely motion for new trial which was overruled March 2, 1936. May 13 it applied for leave to file a second motion for new trial. The application stated that it was made pursuant to 28 U. S. C., § 282,[1] and that the motion was attached to the application. The court granted leave and defendant, May 18, filed its

[1] R. S., § 1088; Judicial Code, § 175; Act of March 3, 1911, 36 Stat. 1141.

second motion for a new trial. The record does not include the motion. After hearing argument the court, June 8, overruled the motion. July 8, defendant filed petition for certiorari.

Plaintiff assumes that defendant's second motion for a new trial was made under § 282 and argues that the running of time allowed for filing petition for certiorari was not postponed until the court disposed of that motion. But it does not appear that the motion was in fact one authorized by § 282. Aside from mere recital in the application for leave, there is nothing to indicate that it was not one made under Rule 91 of the Court of Claims.

That rule declares: "Whenever either party desires to question the correctness or the sufficiency of the court's conclusions on its findings of fact or to amend the same, the complaining party shall file a motion which shall be known as a motion for a new trial. All grounds relied upon for any or all of said objections shall be included in one motion. After the court has announced its decision upon such motion no other motion for a new trial, except that provided by United States Code, title 28, section 282, shall be filed by the same party unless by leave of court. Motions for new trial, except as provided by section 175 of the Judicial Code (U. S. Code, title 28, sec. 282), shall be filed within 60 days from the time the judgment of the court is announced".

Section 282 provides: "The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion, on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States . . . ."

The rule expressly excepts motions under § 282 from those for the filing of which leave of court must be obtained. The statute plainly implies that in accordance with its terms defendant may as of right apply for a new trial. The record does not contain anything to indicate that it was one made upon evidence or otherwise in accordance with statute. Cf. *In re District of Columbia*, 180 U. S. 250, 253. In the absence of definite showing to that effect, it will not be held that the United States applied for or that the court entertained and granted an application for leave

so expressly shown to be unnecessary. On this record, it is reasonably to be inferred, and we find, that the second motion was one filed in accordance with the rule under which application for leave was necessary and not one authorized by the statute for the filing of which permission of the court was not needed. It is clear that the three months' period, § 350, did not commence to run until the court disposed of that motion and did not expire until long after the defendant had filed its petition for this writ. It is well settled that the time within which application may be made for review in this court does not commence to run until after disposition of motion for a new trial seasonably filed and entertained. *Brockett* v. *Brockett*, 2 How. 238, 240. *Texas & Pacific Railway Co.* v. *Murphy*, 111 U. S. 488, 489. *United States* v. *Ellicott*, 223 U. S. 524, 539. *Citizens Bank* v. *Opperman*, 249 U. S. 448, 450. *Morse* v. *United States*, 270 U. S. 151, 153-154. *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498. This court has jurisdiction.

2. The jurisdiction of the lower court was limited to claims sued on before the expiration of the period within which the United States consented to be sued. It did not extend to any cause of action which was not alleged in plaintiff's original petition. As the United States may not be sued without its consent, causes of action not alleged within the period allowed may not be enforced. *Finn* v. *United States*, 123 U. S. 227, 232. The amended petition was not filed within the time allowed; no cause of action was by it brought within the power of the court. *Taylor Co.* v. *Anderson*, 275 U. S. 431, 438-439. *B. & O. S. W. R. Co.* v. *Carroll*, 280 U. S. 491, 495. The judgment may not be sustained as to any item that is not included in a cause of action set up in the original petition or that was by the findings of the lower court or otherwise put upon a ground not there alleged. *Harrison* v. *Nixon*, 9 Pet. 483, 503. *Boone* v. *Chiles*, 10 Pet. 177, 209. *Garland* v. *Davis*, 4 How. 131, 148. It may not be upheld as to any item that is not supported by definite findings of fact extending to all essential issues and which, unaided by statements in the court's conclusions of law or its opinion, are clearly sufficient to entitle plaintiff to recover. *United States* v. *Esnault-Pelterie*, 299 U. S. —, —.

The original petition is in paragraphs designated by roman numerals; the substance of each may be briefly shown:

I. Reference is made to the Act conferring jurisdiction. II. Plaintiff for many years was the owner of funds held in trust by defendant; there existed various treaties and agreements between plaintiff and defendant whereby the trust funds were to be managed and invested by defendant and the interest thereon paid over to the national treasurer of plaintiff. III. From and after passage of the act of June 28, 1898, 30 Stat. 495 (called the Curtis Act) defendant impounded all funds of plaintiff, refused to further pay them to plaintiff's national treasurer and proceeded to disburse them for various purposes. IV. The only authority given by that Act for the disbursement of plaintiff's funds is § 19.[2] After that Act, Congress passed others giving authority for the expenditure of plaintiff's funds, but no subsequent act gave authority for the expenditure of the funds hereinafter mentioned. VI. From "July 1st, 1898, until the present time, defendant, in violation of its duty as trustee of the funds of plaintiff, in violation of the rights of plaintiff under its various treaties and agreements with defendant, and without authority of Congress, has spent large sums of the trust funds of plaintiff". VII. At all times mentioned in the petition R. S., § 2097, was in force.[3] VIII. "Defendant has thus spent, in violation of law, a large amount of the trust funds of plaintiff". The exact amount will be shown by the books and records of defendant.

The prayer of the petition is that defendant be required to file in this cause a statement showing its expenditures of plaintiff's funds "during said period," the purposes for which, and dates when, such expenditures were made, and the authority of law, if any, which authorized defendant to make such expenditures; "that, if necessary thereafter, plaintiff be permitted to amend this peti-

[2] "That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation". 30 Stat. 502.

[3] "No funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner not authorized by such treaty, or by express provisions of law; nor shall money appropriated to execute a treaty be transferred or applied to any other purpose, unless expressly authorized by law". 25 U. S. C., § 122.

tion" and that plaintiff have judgment against the defendant in such sum or sums as shall appear to the court to have been expended without authority of law, with interest at six per cent.

This petition does not include any cause of action that accrued prior to July 1, 1898. Nor is recovery sought on mere failure of defendant to pay plaintiff's funds to its national treasurer or to the Seminoles per capita. The gist of the petition is that defendant disbursed funds of plaintiff for "various purposes" (par. III); and in violation of its duty as trustee and of plaintiff's rights under "treaties and agreements" and "without authority of Congress, has spent large sums of the trust funds of plaintiff" (par. VI). The petition extends to no amount not "thus spent" (par. VIII). It prays statement by defendant only as to "expenditures" of plaintiff's funds "during said period", and seeks judgment only for such sums as appear to the court to have been "expended".

While the amended petition came too late to bring in any additional cause of action or to change grounds on which plaintiff rested its suit, it will be taken into account to the extent that it usefully gives plaintiff's statement of details of causes of action alleged in the original petition and for comparison with the court's special findings of fact. It describes 13 claims; ten of these are in whole or in part included in the judgment. The following state-

ment shows: (1) Paragraphs of the amended petition; (2) Amounts claimed in each; (3) Items identified by arabic numbers used in the opinion below; (4) Amounts of items considered; (5) Findings identified by roman numerals; (6) Amounts included in the judgment; (7) Amounts excluded below.

(1)	(2)	(3)	(4)	(5)	(6)	(7)
III	$63,353.42					
		1	$61,563.42	IV	$61,563.42	
		4	1,790.00	VII	1,790.00	
IV	304,551.28					
		2	150,000.00	V		$150,000.00
		3	154,551.28	VI	154,551.28	
V	90,597.20					
		5	3,097.20	IX	3,097.20	
			750.00		750.00	
			57,500.00		57,500.00	
			[29,250.00]*			29,250.00*
VI	15,000.00					
		6	15,000.00	X		15,000.00
VII	10,000.00					
		7	10,000.00	XI	9,068.24	931.76
VIII	864,702.58					
		8	864,702.58	XII	864,702.58	
IX	154,455.30					
		9	154,455.30	XIII	154,455.30	
X	66,247.37					
		10	51,460.08	XIV		51,460.08
		11	3,909.96	XIV	3,909.96	
		12	4,348.74	XV	4,348.74	
			[6,528.59]†			6,528.59†
XI	178,533.42					
		13	178,533.42	XVI	1,350.55	177,182.87
	$1,747,440.57		$1,747,440.57		$1,317,087.27	$430,353.30

* Not dealt with in the opinion. This amount is made up of a duplication of $26,750, interest for 1899-1909 excluded from consideration because considered in item 8, plus seeming error of $2,500 in calculation of judgment allowed.

† Not dealt with in the opinion. This amount apparently was not claimed in proposed findings of fact, although claimed in amended petition, i. e. included in claim for $66,247.37.

The lower court disallowed all of items 2, 6 and 10 and parts of 5, 7 and 13. Plaintiff has not asked review. Defendant's prayer for reversal does not extend to any part of items 11, 12 or 13.

Items 1, 4 and 7 are by the amended petition indicated to be outside the period alleged in the original petition—from July 1, 1898, to the time of the commencement of the suit. The findings fail to show that any part of these amounts is included in any

cause of action alleged in the original petition to have accrued in that period. All of these items must be deducted from the judgment.

Item 3, $154,551.28, is a part of $304,551.28 first described in the amended petition. Of that amount $150,000 (item 2) was disallowed. The amount included in the judgment rests on special finding VI which is to the effect that commencing with the Act of July 26, 1866 (14 Stat. 263-264) up to and including the Act of April 30, 1908 (35 Stat. 91) Congress annually appropriated $25,000 being the interest at 5% on the $500,000 fund provided in the eighth article of the Treaty of 1856 for the purpose of making per capita payments, and that the United States disbursed the sums thus appropriated for the years involved, either by direct payment per capita to members of the tribe, or by cash payment to the treasurer of the Seminole Nation, *except* interest in years between 1867 and 1879 inclusive, the total of which is $92,051.28, and interest in the years 1907 to 1909 inclusive, amounting to $62,500; and that these items of interest were neither disbursed to members of the tribe nor paid to the treasurer.

But defendant's retention or other disposition of the amounts of interest in years between 1867 and 1879 is not shown by the findings to have been within the period covered by the original petition. For that reason $92,051.28 must be deducted. And for another reason all of item 3 must be eliminated from the judgment. The finding merely shows that defendant did not pay or disburse the amount included in that item to the national treasurer or to members of the tribe. That is not enough. The suit is not to recover money withheld but only for that illegally disbursed or spent by defendant.

Item 5—$90,597.20—as described in the amended petition is interest on the permanent school fund provided for in the third article of the Treaty of 1866. The judgment includes $3,097.20 of that item on account of interest for the years 1867-1874. But it is not shown that any cause of action accrued in respect of that sum after July 1, 1898. The item also includes $750, a part of the interest for 1907 found not to have been paid by defendant to the tribal treasurer. But, as shown above, mere failure so to pay is not sufficient to constitute any cause of action alleged in the original petition. The balance of item 5 includes $57,500, payments to

the tribal treasurer before the passage of the Curtis Act and before commencement of the period covered by the original petition. They must be excluded. The remainder of this item is also a part of item 8 about to be considered. See opinion below, p. —.

Item 8—$864,702.58—is based on a claim which is described in the amended petition, in substance as follows: After the passage of the Curtis Act, defendant impounded all the funds of plaintiff, and assumed full administrative control over the disbursement of same. Notwithstanding "the plain inhibition in said Section 19 that no payments thereafter should be made to 'the tribal governments or to any officer thereof for disbursement', yet in violation of said section the defendant illegally disbursed the amounts hereinafter set forth, derived from" stated sources.[4] "Therefore, the defendant is liable to the plaintiff in the amount of $864,702.58 for the violation of said Section 19 of said Act of June 28, 1898."

This claim is not included in the original petition. It states defendant refused to make payments to the tribal treasurer. Finding XII shows that defendant did pay to the treasurer all the amounts included in the item. The original petition not only failed to lay foundation for the claim but in effect excluded every part of it. The item is included in the judgment on a basis of fact directly opposed to the allegations of the original petition relied on by plaintiff until long after the expiration of the period within which the United States permitted suit in respect of it. The plaintiff is not entitled to recover any part of the item.

3. Item 9 is $154,455.30. Unlike the items considered above, it may be held sufficiently alleged in the original petition. The amended petition, par. IX, gives details as follows: The Original Seminole Agreement ratified by Act of July 1, 1898, 30 Stat. 567, provides that $500,000 of the funds belonging to the Seminoles shall be set apart as a permanent school fund and be held by the United States at five per cent interest. The school fund was established March 6, 1906. Defendant, in violation of the agreement and without authority of law "disbursed from the principal thereof the amount of $154,455.30." Therefore that amount "is due

[4] "Treaty of August 7, 1856, Funds $212,500.00
Treaty of March 21, 1866, Funds 29,750.00
Act of March 2nd, 1899, Funds 622,156.87
Indian Moneys, Proceeds of Labor Fund 295.71
$864,702.58"

the Seminole Nation from the defendant." As to it the court found that the Secretary of the Interior did disburse from the principal of the permanent school fund in 1920 and 1921 "per capita payments" amounting to $32,445.56; in 1921 "equalization of allotments", $490.22; in each of the years 1922 to 1930 payments for "Education" amounting in all to $121,519.52. In its opinion the court said: "That Congress had the power to change the terms of the agreement and authorize these payments, is well established,[5] but we find no act of Congress that either in express terms or by necessary implication authorizes any of them. It must, therefore, be held that they were illegally made and that the Seminole 'permanent school fund'—a trust fund—was unlawfully depleted thereby. The plaintiff is entitled to recover the sum claimed."

Congress contemplated, at least as early as 1898 at the time of the passage of the Curtis Act and the ratification of the Seminole Agreement, that the tribal government was soon to be terminated. The Act of March 3, 1903, § 8, 32 Stat. 1008, declared that it should not continue after March 4, 1906. Congress, by Joint Resolution March 2, 1906, 34 Stat. 822, continued tribal existence and tribal government until all tribal property and its proceeds should be distributed among individual members. The Act of April 26, 1906, § 28, 34 Stat. 148, continued tribal existence and government for all authorized purposes until otherwise provided by law. By Acts passed in 1906 and 1908 Congress directed the Secretary of the Interior to take possession of all buildings used for governmental, school or other tribal purposes, together with the furniture and land pertaining thereto and to sell the same and deposit the proceeds to the credit of the Seminoles.[6] Liquidation of Seminole property and distribution of its proceeds per capita went forward under direction of Congress.[7] And, by May 25, 1918, when the Congress passed the Act making appropriations for the Bureau of Indian Affairs for the fiscal year ending June 30, 1919, under which defendant claims that the per capita payments here in question were made, the need of a permanent school fund had almost ended. At the hearing upon that measure before the House Committee on

[5] Lone Wolf *v.* Hitchcock, 187 U. S. 553, 564-567.

[6] Act of April 26, 1906, §§ 15-17, 34 Stat. 143. Act of April 30, 1908, 35 Stat. 71.

[7] Acts: March 3, 1911, § 17, 36 Stat. 1070. August 22, 1911, 37 Stat. 44. June 30, 1913, § 18, 38 Stat. 95. March 2, 1917, § 18, 39 Stat. 983-984.

Indian Affairs,[8] the Bureau, through the Assistant Commissioner, reported that one of the two Seminole Academies had already ceased to exist, that the other was still used but that public school privileges were within the reach of almost every pupil and that the fund was not needed for the support of any other school. It was on the recommendation of the Bureau that Congress included in § 18 of this Act a clause specifically authorizing the Secretary of the Interior to pay to the enrolled members of the Seminole Tribe entitled to share in its funds, or to their lawful heirs, out of the Seminole school fund not to exceed $100 per capita and directed payment to be made under rules and regulations prescribed by the Secretary.[9] The Act, like earlier ones[10] and those making appropriations for fiscal years ending, respectively, June 30, 1920, and 1921,[11] contained a proviso directing that in the specified fiscal year no money shall be expended from tribal funds without specific appropriation by Congress except "Equalization of allotments, per capita and other payments authorized by law . . ." By regulations promulgated June 17, 1918, par. 14, the Secretary required disbursements to continue "until all claims are paid or until further orders of the Department."

Plaintiff does not claim that § 18 of the appropriation Act of 1918 did not specifically authorize the use of the principal to make the per capita payments here in question. But it contends authority so to use that fund ceased with the fiscal year ending June 30, 1919. The payments authorized constituted a distribution looking

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[8] House Committee Hearings, Indian Appropriation Bill, December, 1917, p. 286.

[9] " . . . That the Secretary of the Interior be, and he is hereby, authorized to pay to the enrolled members of the Seminole Tribe of Indians of Oklahoma entitled under existing law to share in the funds of said tribe, or to their lawful heirs, out of the Seminole school fund, or any moneys belonging to said tribe in the United States Treasury or deposited in any bank or held by an official under the jurisdiction of the Secretary of the Interior, not to exceed $100 per capita: Provided, That said payment shall be made under such rules and regulations as the Secretary of the Interior may prescribe: Provided further, That in cases where such enrolled members, or their heirs, are Indians who belong to the restricted class, the Secretary of the Interior may, in his discretion, withhold such payments and use the same for the benefit of such restricted Indians. . . ." Act of May 25, 1918, § 18, 40 Stat. 580.

[10] Indian Appropriation Acts for the fiscal years beginning July 1, 1912: August 24, 1912, 37 Stat. 531; June 30, 1913, 38 Stat. 95; August 1, 1914, 38 Stat. 600; March 4, 1915, 38 Stat. 1228; May 18, 1916, 39 Stat. 148; March 2, 1917, 39 Stat. 985.

[11] Act of June 30, 1919, § 18, 41 Stat. 23. Act of February 14, 1920, § 18, 41 Stat. 427-428.

to the ultimate disposition of all tribal property. The provision expressed no limitation in respect of the time within which they were to be made. The occasion and purpose of the enactment tend strongly to negative any implication that Seminoles entitled to participate in the distribution would be barred if the Secretary failed to cause payments to be made them within the fiscal year. The provisos contained in the appropriation Acts for the fiscal years 1920 and 1921 during which the per capita payments in controversy were made reasonably may be deemed sufficient to authorize them. Weight is to be given to the Secretary's regulations, par. 13, which declared that all suspended or withheld payments were "to be disbursed at such times and in such amounts as the best interest of the persons, to whom such suspended or withheld payments are due, may demand." Plaintiff's contention that it is entitled to recover upon the ground that the per capita payments were not made within time allowed therefor is without merit. The amount of the per capita payments must be eliminated from the judgment.

As to the amount of $490.20 paid out of the school fund for "equalization of allotments", the defendant relies upon a provision in the appropriation Act of February 14, 1920, 41 Stat. 427, declaring: "That hereafter no money shall be expended from tribal funds . . . without specific appropriation . . . except as follows: Equalization of allotments . . . and other payments authorized by law to individual members of the respective tribes . . ." But defendant fails to show that the excepted payments were "authorized by law." This amount was properly included in the judgment.

As to the sum of $121,519.52 made up of payments from 1922 through 1930 for "Education", the sole question is whether Congress authorized the use of the principal of the permanent school fund for that purpose. The appropriation Acts applicable to these years authorized the Secretary of the Interior to continue Seminole schools from the tribal funds.[12] It must be assumed that when enacting these measures Congress took into account the fact that

[12] Act of March [illegible], 41 Stat. 1243; Act of May 24, 1922, 42 Stat. 575; Act of Jan. 24, 1923, 42 Stat. 1196; Act of June 5, 1924, 43 Stat. 398; Act of March 3, 1925, 43 Stat. 1148; Act of May 10, 1926, 44 Stat. 460; Act of Jan. 12, 1927, 44 Stat. 948; Act of March 7, 1928, 45 Stat. 216; Act of March 4, 1929, 45 Stat. 1577.

the Seminole school fund in pursuance of its authority had been so depleted that interest on the amount remaining in it would not meet even the lessened requirements. Its failure to limit expenditure for education to interest on the permanent fund and adherence to substantially the same form of words yearly throughout the entire period sufficiently indicate the intention of Congress that disbursements for that purpose were not limited to the interest and that principal was to be used. The inclusion of that amount in the judgment cannot be sustained.

The judgment will be reversed and the cause remanded to the lower court with directions for further proceedings in accordance with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.